STATE OF MAINE
PUBLIC UTILITIES COMMISSION

January 29, 1999

EXAMINER'S REPORT

MID-MAINE TELPLUS
Request for Arbitration of an Interconnection Agreement with Bell Atlantic

Docket No. 98-593

MID-MAINE TELPLUS
Request for Commission Investigation of Unreasonable Acts and Discriminatory Practices of Bell Atlantic - Maine Regarding Interconnection Rates, Terms and Conditions[1]

Docket No. 98-806

NOTE: This Report contains the recommendation of the Hearing Examiner. Although it is in the form of a draft of a Commission Order, it does not constitute Commission action. Parties may file responses or exceptions to this Report on or before February 12, 1999. It is expected that the Commission will consider this Report at its Deliberative Session on March 1, 1999. The parties have come to an agreement that establishing the deadline for this case as March 5, 1999.

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[1]Please see Issue E7 for the explanation of the proposed opening and disposition of this proceeding, under state law, pursuant to 35-A M.R.S.A. §§ 1303 and 1306.

INTRODUCTION

This Order decides a number of issues between Mid-Maine TelPlus (MMTP)[2] and New England Telephone & Telegraph Company d/b/a Bell Atlantic-Maine (BA-ME, BA or Bell Atlantic) in an arbitration proceeding brought pursuant to the federal Telecommunications Act of 1996 (TelAct), codified in Title 47 of the United States Code. 47 U.S.C. § 252 allows "requesting carriers" (here, MMTP) and incumbent local exchange carriers (ILECs; here, BA-ME) to negotiate an "interconnection agreement" that addresses the various obligations imposed by 47 U.S.C. § 251(c) on ILECs at the request of "requesting carriers." The section 251(c) obligations that are at issue in this proceeding to provide: (1) "interconnection" (section 251(c)(2)), allowing the requesting carrier and the ILEC to exchange traffic, so that each carrier's customers may call customers of the other carrier; (2) access to "network elements on an unbundled basis" (section 251(c)(3); and (3) "collocation" at premises of the ILEC (section 251(c)(6)) for the purpose of "interconnection" and "access to unbundled network elements." Collocation is therefore a means of providing the first two described above.

If parties cannot agree to a negotiated interconnection agreement, either one may request a state utilities commission to "arbitrate" the terms of an interconnection agreement. 47 U.S.C. § 252(b). MMTP requested arbitration in this case. The procedural history of this proceeding is set forth in Appendix A.

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[2]The parties have consistently referred to Mid-Maine TelPlus as "Mid-Maine." We use the abbreviation MMTP in order to avoid any possible confusion and make clear the distinction between the CLEC (MMTP) and Mid-Maine Telecom, Inc., an incumbent local exchange carrier (ILEC) and independent telephone company (ITC) that presently provides service to an area northwest of Bangor. MMTP is an affiliated interest of Mid-Maine Telecom.

While the arbitration has been pending the parties have continued to negotiate and have reached an agreement as to many of the issues that they initially presented as unresolved to the Commission during the briefing stage and even after briefing. Accordingly, this Order [Examiner's Report] does not address every issue that the briefs address. Where there is some doubt about whether the parties have agreed to a resolution of an issue, the Order [Examiner's Report] will state our understanding of the status of the issue.

We list here some common terms and case names that we commonly cite or refer to in this Order:

- TelAct - the Telecommunications Act of 1996, codified in Title 47 of the United States Code. This Order addresses issues primarily under 47 U.S.C. §§ 251 and 252.

- *Local Competition Order* - the Order issued by the Federal Communications Commission (FCC) that comprehensively addresses interconnection, unbundled network elements and collocation issues under the TelAct. The full citation of that Order is *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order (August 8, 1996).

- *Iowa Utilities Board* - the full title of this case is *Iowa Utility Board v. Federal Communications Commission,* 120 F.3rd 753 (8th Cir. 1997). All of the appeals from the FCC's *Local Competition Order* were consolidated in the United States Court of Appeals for the 8th Circuit. The Court of Appeal's decision addressed all the issues in those appeals, reversing the FCC as to certain matters and affirming it as to others. This Court of Appeals decision was reviewed by the United States Supreme Court in the next listed decision.

- *AT&T v. Iowa Utilities Board*. The decision of the United States Supreme Court that reviewed the Court of Appeals *Iowa Utilities Board* decision described above. The Supreme Court's decision was issued on January 25, 1999 and reversed several decisions of the Eighth Circuit decision (thereby reinstating some FCC rulings and affirming others). The effect of the decision was to reinstate several FCC rulings, but it also reversed one FCC ruling. The full citation of the case is *AT&T Corp. v. Iowa Utilities Board*, ___ U.S. ____ (1999).

- MMTP Combined Brief - MMTP's "Post-Hearing Combined Brief" filed on December 10, 1998. It includes MMTP's post-hearing arguments and most of its arguments from its initial brief filed on October 19, 1998.

- MMTP Initial Brief - MMTP's Brief and Fact Summaries filed on October 9, 1998. A few arguments that we refer to are contained in that brief and not in the Combined Brief described above.

- BA-ME Post-Hearing Brief - filed on December 10, 1998.

- BA-ME Direct Presentation - BA-ME's Direct Presentation with Factual Summary by witnesses, filed on October 19, 1998.

DISCUSSION OF ISSUES

In this section of the Order, we discuss each issue the parties asked the Commission to arbitrate, by reference to the issue numbers designated by the parties themselves. Because the parties reached agreement on some issues, the issue numbering below contains gaps.

A. INTERCONNECTION AND RECIPROCAL COMPENSATION

A1. Methods of Interconnection

(i) Interconnection at Technically Feasible Points

MMTP has asked the Commission to require that the interconnection agreement include a provision that interconnection between MMTP and BA-ME may occur at any "technically feasible point on BA's network." "Interconnection" is the method by which each carrier exchanges its traffic with the other. BA will not agree to such a provision; its "template" agreement specifies three places at which interconnection may occur.[3]

[3]The template language lists three methods of interconnection: (1) interconnection via collocation at a specified Bell Atlantic Billing Interconnection Point; (2) interconnection via a third-party's collocation site at a Bell Atlantic Billing

MMTP points out that the TelAct, 47 U.S.C. § 251(c)(2) requires that ILECs provide interconnection at any technically feasible point on their networks. The FCC, in the *Local Competition Order* ¶¶ 209-212 and in its regulations, 47 C.F.R. § 51.305, requires ILECs "at a minimum" to provide interconnection at five specified points, as well as at all points at which access to unbundled network elements (UNEs) is required.

MMTP is concerned that Bell Atlantic might attempt to use the Agreement's specification of a limited number of points for interconnection to preclude interconnection at other technically feasible points. Bell Atlantic states that numerous approved agreements have been based on the template and have limited the number of interconnection points.

TelAct section 251(c) establishes a number of rights for "requesting telecommunications carriers," two of which are relevant to the discussion of this Issue A1. Section 251(c)(2) establishes the right of "interconnection" at any "technically feasible point within the [incumbent local exchange] carrier's network . . . ." Section 251(c)(3) establishes the right to "access" to "network elements on an unbundled basis at any technical feasible point . . . ." The first right provides for the exchange of traffic between the carriers. Absent such arrangements customers of one carrier could not call customers of the other. The purpose of the second right is to allow requesting telecommunications carriers to use the facilities ("network elements") of ILECs in their own provision of telephone service.

Interconnection Point; and (3) interconnection via entrance facility and transport where such facility extends to the BA Billing Interconnection Point from a mutually agreed to point on Mid-Maine's Network.

BA is concerned that MMTP will attempt to use an ability to interconnect at points other than those specified in the template agreement to gain an advantage in its attempts to obtain access to additional unbundled network elements:

> Mid-Maine focuses on supposedly "technically feasible" points of *interconnection* solely to improperly influence the debate on where Mid-Maine may access *unbundled network elements*, or potentially access sub-elements (such as subloops). In other words, Mid-Maine seeks to inject into Section 4.0 of the contract proposed language which might bolster its argument to obtain access to loops over copper facilities, or help Mid-Maine argue for access to subloops in remote terminals. Mid-Maine hopes to divert the Commission's focus by mislabeling as an interconnection issue under Section 251(c)(2) a matter which is actually related to Mid-Maine's accessing BA-ME's UNEs under Section 251(c)(3).

BA (emphasis added)

As noted above, section 253(c)(2) requires ILECs to provide interconnection at any "technically feasible point." The locations of technically feasible points for interconnection may not always be at the same places as technically feasible points for access to UNEs, but the two categories are highly likely to coincide. Many UNEs terminate at wire centers (central office buildings). Wire centers are also a convenient and technically feasible location for the transfer of traffic (interconnection). In the *Local Competition Order* the FCC saw no significant distinction between technically feasible points of interconnection and technically feasible points of access to unbundled elements. The FCC first noted that section 251(c)(2)(interconnection) and 251(c)(3)(access to unbundled elements) both use the "technically feasible point" standard. It discussed the standard and its applicability to both interconnection and access to UNEs jointly (¶¶ 192-206). It also stated:

> We also note that the points of access to unbundled elements discussed below may also serve as points of interconnection (*i.e.,* points in the network that may serve as places where potential competitors may wish to exchange traffic with the incumbent LEC other than for purposes of gaining access to unbundled elements), and *thus we incorporate those points by reference here.*

Local Competition Order at ¶ 212 (emphasis added). Thus, in addition to 5 specific points of interconnection, the FCC also required interconnection at all points at which ILECs must provide *access to UNEs*.[4] The FCC has therefore already answered Bell Atlantic's objection. Under regulations established by the FCC, a CLEC may obtain interconnection at any point at which it may also obtain access to UNEs.

We reject Bell Atlantic's argument. MMTP has the right by law to obtain interconnection from an ILEC at any technically feasible point. We cannot require the interconnection agreement to limit the number of technically feasible points for interconnection.

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[4]The FCC requires interconnection:

> at any technically feasible point within the incumbent LEC's network including, at a minimum:
>
> (i) the line-side of a local switch;
> (ii) the trunk-side of a local switch;
> (iii) the trunk interconnection points for a tandem switch;
> (iv) central office cross-connect points;
> (v) out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and
> (vi) the points of access to unbundled network elements as described in § 51.319 of this part.

47 C.F.R. § 51.305(2); *Local Competition Order* ¶ 212.

In addition to noting that its list was a "minimum list," the FCC "anticipate[d] and encourage[d] parties and the states, through negotiation and arbitration, to identify additional points of technically feasible interconnection." *Local Competition Order* ¶ 212.

Beyond its complaint about Bell Atlantic's attempt to limit the number of interconnection points, MMTP has not specifically complained about the three categories listed in the template agreement. We assume that there is some overlap between the three categories listed in the template agreement and the six categories contained in the FCC regulation, but it is also possible that one list may include points of interconnection that are not included in the other. Accordingly, we will require the interconnection agreement to include the three locations listed in the template agreement as well as the six categories contained in the FCC regulation, unless MMTP agrees with BA that a category may be omitted. The interconnection agreement shall also include a further category of "any other technically feasible point of interconnection, subject to the criteria contained in 47 C.F.R. § 51.305(b) - (f)."

(ii) Interconnection Point v. Point of Interconnection

This appears to be a dispute concerning clarification of certain definitions in the Agreement (IPs and POIs).[5] The parties have not presented us with sufficient information in their briefs for us to decide this issue.

(iii) Disparity in Rates

"Disparity in rates" relates to the rates that must be paid by MMTP (and possibly by BA-ME) for trunking by BA-ME (and possibly by MMTP) of traffic between BA-ME and MMTP customers who are located in the same local calling area.

Both parties have agreed that their rating points (known as "interconnection points" or "IPs") shall be "geographically relevant." The parties reached a tentative agreement concerning that issue in Issue B13. The

[5]See Issue AI(iii) below.

"interconnection point" (IP) is distinguished from the "point of interconnection" (POI), despite the semantic identity of the two phases. The POI is the actual physical point at which the two carriers' networks are interconnected. A "geographically relevant" IP (the billing or rating point) must be within 25 miles of where the local call terminates.

To discuss this issue we will assume that MMTP offers local service in Greenville, but that its switch that provides switching to its Greenville exchange is located in Bangor.

In our first example, a MMTP customer in Greenville will place a local call to a BA-ME customer in Greenville. The call will travel over a MMTP loop facility[6] to MMTP's Bangor switch. Once the call is transferred to BA-ME at the POI (the physical interconnection point) in Bangor,[7] it will be transported over BA-ME trunks to BA's Greenville switch and thence on a BA loop to BA's customer. BA will designate the Greenville switch as its IP (although, under the agreement, it could designate an IP within 25 miles of Greenville). MMTP will therefore be responsible for the cost of transporting the traffic from its Bangor switch to BA's IP in (or near) Greenville, a result that is consistent with the fact that the long transport is made necessary by the location of MMTP's switch and its long distance from Greenville.

Our second example is the reverse of the first. Here, a BA-ME customer in Greenville calls an MMTP customer in Greenville. The agreement would

[6]Such a "loop facility" might consist in part of a local loop facility combined with an "interoffice transmission facility" that used in a dedicated manner. See Issue E7. Other configurations are also possible.

[7]We assume the POI is in Bangor to simplify the example. It is possible that the POI will be in Portland. The return trunking to Greenville may have to be routed through Portland.

require MMTP to designate its IP within 25 miles of its terminating customer. As in the first example (MMTP customer calls a BA-ME customer), MMTP would be financially responsible for the trunking from the IP at or near Greenville to Bangor. Most likely BA-ME would provide the physical trunking and MMTP would pay BA-ME.

The dispute in this Issue AI(iii) is about a rate. However, the briefs do not make clear what that rate is. MMTP provided only three sentences of argument on this issue; BA-ME, none. The parties' representatives in lengthy telephone conferences have been unable to identify the rate, although those conferences were very helpful in explaining the rate point (IP) and routing structure described above. It its brief, MMTP states that BA-ME:

> wants to limit *Mid-Maine charges* to no more than Mid-Maine's tariffed non-distance sensitive Entrance Facility charge for the transport of traffic from BA-IP to a Mid-Maine IP . . . .[8] (emphasis added)

Apparently, the charge in question is a MMTP charge that BA-ME must pay to MMTP. We can guess that such a payment may occur if MMTP provided trunk facilities and BA was under some obligation to pay MMTP for trunking. However, under the description above, BA generally would never pay for more than 25 miles of transport per call; therefore distance sensitivity should not be a significant issue. MMTP also argues that the "parties' rates should be symmetrical," but what rates those are is unclear.

[8]The structure of this sentence does not make clear whether BA seeks (1) to limit some unidentified MMTP charge to a benchmark that is equal to MMTP's existing "non-distance sensitive Entrance Facility charge for the transport of traffic from BA-IP to a Mid-Maine IP"; or (2) more logically, to limit MMTP's charge for transport from a BA-ME IP to a MMTP IP "to no more than Mid-Maine's tariffed non-distance sensitive Entrance Facility charge for the transport of traffic from BA-IP to a Mid-Maine IP."

We do not have sufficient information to understand what rate issue the parties are disputing.

A2. Mid-Span Meet/SONET

MMTP's Combined Brief does not address this issue. BA's Post-Hearing Brief does address the issue and argues that terms and conditions of a specific Mid-Span Meet, or of the employment of SONET architecture for the Mid-Span Meet should be left to the joint grooming process. MMTP's initial brief (October 19, 1998) states that the "only open issues appear to be the selection of SONET OLTM, the equipment used for interconnection and the specific Mid-Span Meet." Mid-Maine proposes that both of these issues be addressed as part of the joint grooming process. There does not appear to be an issue presented at this time.

A3. Reciprocal Compensation

The issue here is whether both parties should pay reciprocal compensation for traffic sent to Internet Service Providers ("ISP") until the FCC, the Commission, or a court of relevant jurisdiction determines whether such traffic should or should not be subject to reciprocal compensation requirements. Throughout this process the parties informed us that they thought they could develop an interim agreement that would in effect defer the issue until the FCC ruled regarding the jurisdictional nature of this traffic. We were informed at the last minute they could not. We will not decide reciprocal compensation issues at this time and possibly not until the FCC rules with regard to the jurisdiction of this traffic. If the FCC finds that internet traffic is intrastate and local, we will then address reciprocal compensation issues for that traffic.

B. NETWORK ARCHTECTURE

B5. NXX Updates.

The parties have settled several sub-issues under this heading. The remaining dispute is whether the Agreement should include a provision for liquidated damages.

The parties have agreed that each party is under an obligation to update its switches in a timely manner, after one party notifies the other about the assignment of new NXXs (CO codes) or changes to old ones. If the switches are not updated, customers whose numbers are assigned to the new NXXs may not receive calls. MMTP argues that the agreement should contain a provision stating that if either party (a) fails to update a switch, (b) is notified that a switch has not been updated, and (c) fails to act promptly and reasonably to update the switch, that party should be liable for liquidated damages in the amount of $1,000 a day.

This is the first issue in which we must confront certain general arguments presented by both parties that apply to several issues in this proceeding. Bell Atlantic offers all CLECs a standard "template" agreement. For many matters, MMTP wishes to deviate from the template agreement. Bell Atlantic argues that it is reasonable for it to insist on adherence to the template agreement because a lack of uniformity and the need to administer many different contractual arrangements will lead to operational difficulties and greater expense. Bell Atlantic argues:

> With respect to . . . disputes [over contract language], where parties seem to be in substantial agreement over broad operating concepts but are unable to fashion mutually acceptable contract language, a few introductory remarks are appropriate. While disagreements over language may

> superficially appear petty, the consequences to BA-ME's operations of the language are not. Once the contract is signed, the parties must proceed to implement and administer its provisions. And while Mid-Maine can devote all of its energies to its lone interconnection agreement with BA-ME, Bell Atlantic must honor and administer numerous interconnection agreements across its footprint where even slight modifications may prove costly to implement.
>
> The simultaneous implementation and administration of fundamentally differing interconnection arrangements presents a costly and unnecessary logistical and internal management challenge for BA-ME. The only way for BA-ME to carry out reliably its numerous contractual obligations is to "standardize" contract provisions as much as possible. While this does not mean a requesting CLEC must take standard contract provisions, the negotiation process necessarily requires a CLEC seeking a variation in proposed language to articulate in good faith a legitimate business requirement necessitating a modification in standard contract language. It simply is not feasible for BA-ME to accept changes in contract provisions which reflect little more than an individual CLEC's pride of authorship.

In response, MMTP argues:

> The standard Bell Atlantic "template" interconnection agreement simply does not accommodate the arrangements necessary to bring [the] services [MMTP intends to offer] to customers in most of Maine. Hence, one should not be entirely surprised that there is no significant local competition in Maine (outside of Portland), notwithstanding the fact that Bell Atlantic has signed numerous interconnection and resale agreements with CLECs. In order to bring modern telecommunication services to most parts of the State of Maine, a CLEC must not only be innovative, creative and committed, but also cannot be placed in the straitjacket of the Bell Atlantic template. Although the template may accommodate CLECs in large, urban areas, such as Manhattan, it has a stifling effect on competition in this State.
>
> The desire of a company like Bell Atlantic, which must deal with a multitude of requests for interconnection, to develop a

> standardized or "template" approach to such agreements is understandable. However, a company as large as Bell Atlantic, and serving as diverse a service area as Bell Atlantic, must understand and must accommodate the differences among geographical areas. Thus, a template which may be suitable for Manhattan cannot be expected to apply wholesale to less urban areas, whether they be in Maine, West Virginia, or even upstate New York . . .
>
> It is not fair (and it is not good public policy) that a template be used as a broad shield against good faith negotiations and constructive mediation and arbitration. In this case (and in negotiations) Bell Atlantic has attempted to create a presumption that the template should govern and to shift the burden on to any CLEC which is seeking different terms and conditions for interconnection. Bell Atlantic is simply creating diversions from the fundamental requirement that Bell Atlantic has the burden of demonstrating that its terms and conditions for interconnection are reasonable and that its objections are justified.

We make a few observations about these arguments. First, we view MMTP's argument that the template is somehow relevant to New York City, but not Maine, as being mere unproven speculation. Nowhere in MMTP's brief does it identify a specific provision of the template agreement as being inappropriate for Maine, for a rural area, or only appropriate for New York City. MMTP has stated the reasons it wishes to deviate from the template clearly, but none of those reasons have anything to do with the rural nature of its operation or with the supposed urban nature of the template. Second, we agree with MMTP that Bell Atlantic has in effect suggested that the Commission should consider the template to be presumptively reasonable, and that MMTP should have the burden of proof of establishing the need for and reasonableness of any deviation. Third, MMTP provides no support in its brief for its conclusory argument that Bell Atlantic "has the burden of demonstrating that its terms

and conditions for interconnection are just and reasonable and that its objections are justified."[9]

The adoption of a simplistic burden of proof rule would make decisions easier in this case, particularly as to issues over contractual language, of which there are many. We reject such an approach. Among other reasons, it is not obvious which party should have the burden. We will, however, adopt two guidelines for decisions about whether we should order provisions in the interconnection agreement that deviate from BA's template.

Where it is reasonably evident that a deviation from the template agreement is likely to cause actual operational difficulties for Bell Atlantic, MMTP must establish the need for and reasonableness of its request for deviation. Bell Atlantic has raised a legitimate concern: if an entity must administer a large number of contracts, uniformity among the contracts has value, and a deviation that is likely to cause operational difficulties should be justified. On the other hand, where it is not apparent that deviation will cause operational difficulties to Bell Atlantic, and MMTP's request appears to be reasonable and may offer advantages to it over the template, we will generally grant that request even in the absence of a showing of specific need.

In determining whether a particular deviation will cause operational difficulty for Bell Atlantic, we will consider the likelihood that BA-ME will be aware of the different contractual provision at the appropriate time. As BA-ME argued in a mediation session, the contract is filed in a file drawer or computer; BA's operational personnel

[9]As to many specific interconnection, issues, however (e.g., that a requested point of interconnection is not technically feasible), the FCC has ruled that ILECs have the burden of proof. *See* Issue A1 above. We are not aware of any general burden such as that assumed by MMTP.

are unlikely to know of its contents, particularly deviations from the template. In BA-ME's view deviant provisions are a "trap." In many cases, however, the different provision does not require BA to do anything in response to some external event. The practical burden will be on MMTP to bring the deviation to BA-ME's attention in order for the provision to be applied. For example, turning to the issue addressed in this section, BA-ME is unlikely to automatically to pay MMTP liquidated damages unless MMTP brings the liquidated damages to the attention of BA-ME. Moreover, under the provision we order below, MMTP must notify BA-ME of its initial failure to make an NXX change to one of its switches. By contrast, if some external event is supposed to trigger some action by BA-ME, without notice (or perhaps even knowledge) by MMTP, the administrative burden on BA-ME is obviously greater.

We decide that inclusion of a liquidated damage provision in a contract does not create a significant administrative burden. The purpose of a liquidated damages provision is to avoid litigation over the amount of actual damages. The existence of a liquidated damages provision may therefore be advantageous to both parties and their contractual relationship. Bell Atlantic argues that liquidated damages for failure to update NXXs are not needed because of its excellent record in that respect. If Bell Atlantic is correct, it will not have to pay liquidated damages. BA also states that it is concerned that "Mid-Maine may intend to rely on such language to somehow enforce NXX codes assignments which may be antithetical to the efficient utilization of NXX codes." Bell Atlantic does not explain how Mid-Maine could use a liquidated damage provision to such effect.

MMTP states that "without a liquidated damages provision, BA may *refuse* to correct and identify the problem" (emphasis added). It also suggests that liquidated damages should apply only if a party "refuses" to correct an inadvertent failure. We believe that "refusal" seems unlikely; "failure" (which is the first term used by MMTP in its brief) is more likely. We decide that a liquidated damages provision shall be included in the Agreement. It shall specify that liquidated damages must be paid if (1) a party has requested an NXX change, (2) the other party has not made the change, (3) the requesting party notifies the other party that the change has not been made, and (4) the carrier with the obligation to make the change does not make it within 24 hours after being notified.

MMTP has requested liquidated damages in the amount of $1,000 per day. MMTP discusses the possible harm to retail customers (they cannot receive calls), yet any liquidated damages would be paid to MMTP, not its customers. MMTP does not discuss the possible harm to MMTP if its retail customers fairly or unfairly blame MMTP for the problem. MMTP does state that actual damages to MMTP are difficult to determine, but it is also difficult to determine true actual damages to the end-user customer. One of the purposes for a liquidated damage provision is to provide a deterrent; the other is to avoid litigation over damages; as a surrogate for actual damages such a provision is a rough guess at best. We therefore believe that we should base the amount of liquidated damages on their other purpose, deterrence, and that $300 per day should serve as a sufficient deterrent.

B7. Forecasting Requirements and Obligations

The parties have agreed that MMTP must provide trunk forecasts to BE-ME. BA-ME uses those forecasts for determining the amount of trunking it must provide to carry traffic originated by BA-ME customers that terminates with MMTP customers. Both parties agree that trunking and forecasting requirements for the trunks that carry MMTP-originated traffic to Bell Atlantic are not at issue.

BA-ME's Direct Presentation discusses trunks that BA-ME must itself construct. By contrast, Bell Atlantic's Post-Hearing Brief and Mr. Albert's Reply Declaration both state that BA-ME obtains "these trunks" from Mid-Maine. A telephone conference (January 19) confirmed that both situations may occur. For the trunking that BA-ME must provide, it may either deploy its own facilities or lease facilities that may be available from MMTP.

The disputed issue is the length of time that BA-ME must continue to supply trunking after it has installed (or purchased) trunking to carry its traffic to MMTP, based on MMTP's forecasts. Bell Atlantic states that it is willing to rely on those forecasts initially, but if trunks are underutilized after 90 days, it may disconnect, remove or redeploy (or stop paying MMTP for) the trunks.[10] MMTP argues that the interconnection agreement should require BA-ME to keep in place the trunks it installs pursuant to MMTP's forecasts for a period of 180 days.

BA-ME also asserts that MMTP should pay for any trunks, installed by BA-ME pursuant to MMTP's forecast, that are underutilized. In the January 19 telephone conference the parties clarified that the two remedies are additive. The

[10]BA-ME defines "significant underutilization" as utilization less than 75% based on standard traffic engineering practices. MMTP does not appear to dispute this standard.

financial responsibility requirement would apply to underutilized trunks during the period (whether 90 days or 180 days) prior to any right that Bell Atlantic might have to disconnect; otherwise, the two remedies could be viewed as alternatives. MMTP agrees that it should be financially responsible during the period prior to the date that Bell Atlantic would have the right to disconnect.

Thus, the major issue is the time period that Bell Atlantic must maintain trunking facilities for traffic originated by its customers that is destined for MMTP customers. In support of the 180 days period, MMTP argues:

> Mid-Maine must plan to advance to account for its customer's traffic patterns. This requires the installation of trunks prior to heavy traffic (and tourist) seasons and the addition of customers. Given the weather, trunk installation times, customer needs and the like, Mid-Maine must allow for ramp up time in its trunking forecasts. It would be irresponsible to base, for example, trunking needs for June, July and August, on traffic usage in January, February and March. It would also be irresponsible for Mid-Maine to not provide forecasts that take into account an impending new customer's traffic.

MMTP argues that Bell Atlantic states that it is willing to be financially responsible for underutilized trunking for the full 180-day period. MMTP also urges that BA-ME should be required to challenge forecasts it believes are not credible through the dispute resolution process in the interconnection agreement, "as long as such challenges do not serve to delay the implementation of Mid-Maine's trunks.

BA-ME's briefs supply little argument in support of a 90-day period rather than a 180-day period. BA states only that 90 days is "reasonable" and that 180 days "is not necessary to accommodate a 'seasonal' variations." In telephone conferences (January 11 and 19) BA-ME stated its view that trunking facilities are "scarce

resources" and it did not believe it made sense to tie up underutilized trunks if they could be used for other purposes.

We place little weight on MMTP's "seasonal" argument. If the difficulty of projecting summer traffic volumes from winter traffic volumes were truly at issue, and the previous summer's traffic were needed to project the next summer's traffic, MMTP would presumably be arguing for a waiting period of at least a year. It appears to us that the real issue is, or ought to be, the amount of response time that it takes each carrier to provide trunking facilities after MMTP has provided a forecast. MMTP mentions "installation times" as a factor, but the record provides no evidence of how long it takes to install trunks.

We do not believe MMTP has provided a sufficiently compelling reason to require that underutilized trunks remain in place for a full 180 days. It appears that MMTP may provide a forecast at any time. While the record is silent on the question of the response time for providing trunks by Bell Atlantic, our advisory staff has considerable knowledge as to those matters. According to staff**,** BA-ME appears to have reasonable amounts of optic cable in its system to provide additional trunking along existing routes. The Commission has not been made aware of any shortages of such capacity. BA-ME has used an automated Trunks Integrated Record Keeping System (TIRKS) to track and assist in controlling assignment of interoffice facilities. TIRKS enables BA-ME to track and manage interoffice facilities fairly rapidly once a service order for such facilities has been entered into its system. If it is necessary to cross-connect facilities or there is a shortage of trunk ports at the connecting wire center, additional time may be required. Under these circumstances, it is reasonable

to conclude that BA-ME usually should be able to provide interoffice trunking within 90 days, unless physical facilities or electronic components are not in place on the needed route(s).

Chapter 110, § 773 states that "Factual information shall be considered only if such information is in the record as evidence." Pursuant to Chapter 110, § 927 (Official Notice):

> The Commission or presiding officer . . . may take official notice of . . . technical matters within their specialized knowledge . . . .

In addition, under Chapter 110, § 775 the Commission may

> use its experience, technical competence and specialized knowledge, including that of the members of its advisory staff, in the decision-making process, for the purpose of evaluating the evidence presented to it.

Pursuant to Chapter 110, § 927 we adopt the factual statement above provided by Staff and find that, under most normal circumstances, BA-ME can deploy new trunking facilities well within a period of 90 days.[11]

Based on the foregoing facts and analysis, MMTP should have ample opportunity to provide forecasts or updated forecasts, and expect that BA-ME will provide sufficient trunk capacity without the necessity of "holding over" excess capacity

[11] **EXAMINER'S NOTE:** Section 927 states further:

> Parties shall be notified of the material proposed to be so noticed, and they shall be afforded an opportunity to contest the substance or materiality of the facts noticed.

If either party wishes to contest the contents or use of the proposed factual statement above, the party should provide immediate telephonic notice to the other party and to the Examiner and file a written objection stating the basis for its objection within 7 days following the issuance of the Examiner's Report.

as a form of "insurance" for an additional 90 days beyond the initial 90 days. As BA-ME points out in its Direct Presentation the "template agreement obligates both parties to augment trunk facilities as necessary to avoid blockage. . . . BA-ME has every incentive to provide sufficient trunk capacity so that calls from its subscribers to Mid-Maine's subscribers are not blocked."

For the foregoing reasons, we rule that BA-ME will not be required to maintain trunking facilities that are underutilized for more than 90 days following the date that those trunks are put in service. The interconnection agreement shall also include the template provision described above that requires each party to provide facilities as necessary to avoid blockage. It shall further require, as MMTP has agreed, that MMTP shall be financially responsible for underutilized trunking during the 90 days following the implementation of trunking facilities. Where BA-ME has leased the trunking facilities from MMTP, MMTP is free to leave excess capacity in place after 90 days, provided that BA-ME has no obligation to pay for it.

B9. Use of Copper Facilities

MMTP has requested copper access to the local loop (CALL) at two points: (a) the feeder distribution interface (FDI) sites[12] and (b) at collocated facilities located in wire centers. MMTP states that it needs CALL copper access at both points in order for it to be able to offer xDSL[13] services in an economically viable manner.

[12]An FDI is the facilities connection point in a remote facility housing, between the feeder and distribution portions of a loop.

[13]xDSL refers to a Digital Subscriber Loop that can be provisioned through

BA has indicated it has no present plans to deploy xDSL in the areas MMTP proposes to serve. Normally xDSL service can only be economically provided on copper loops. However, xDSL is not feasible, if the length of the copper loop exceeds 18,000 feet. One of the main reasons MMTP requests access at POI sites is because many of BA-ME's loops use fiber between the switch and the FDI. In addition, many local loops in Maine are longer than 18,000 feet. Access in the middle of such a loop may, in some instances, allow MMTP to provide a loop whose total length is less than 18,000 feet.

It has been the policy of this Commission that it is in the public interest to "creat[e] an environment that results in lower prices, expanded customer choice and increased innovation." *Public Utilities Commission, Order Adopting Amendments of Chapter 280, Provisions of Competitive Telecommunications Services,* Docket No. 96-526, Order at 3 (June 10, 1997). xDSL is a service that may increase customer choice and increase innovation since it will allow customer access to the internet at much higher speeds than normally obtainable using analog loops.

FCC regulation 47 C.F.R. § 51.321 provides for methods of interconnection *and* access to UNEs. Section 51.321(a) states:

> (a) Except as provided in paragraph (e) of this section, an incumbent LEC shall provide, on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of this part, any technically feasible method of obtaining interconnection or access to unbundled network elements at a particular point upon a request by a telecommunications carrier.

Synchronous, Asynchronous, or other protocols

"Premises" are broadly defined to include ILECs'

> central offices and serving wire centers, as well as all buildings or similar structures owned or leased by an incumbent LEC that house its network facilities, and all structures that house incumbent LEC facilities on public rights-of-way, including but not limited to vaults containing loop concentrators or similar structures."
>
> 47 U.S.C. § 51.321(b) states:
>
> (b) Technically feasible methods of obtaining interconnection or access to unbundled network elements include, but are not limited to:
>
> (1) physical collocation and virtual collocation at the *premises* of an incumbent LEC; and
>
> (2) meet point interconnection arrangements.

(emphasis added)

Finally, FCC regulations governing collocation require ILECs to "permit the collocation of any type of equipment used for interconnection or access to unbundled network elements." 47 C.F.R. § 51.323. They further provide that "when an incumbent LEC provides physical collocation, virtual collocation, or both, the incumbent LEC shall . . . (3) permit interconnection of copper . . . cable if such interconnection is first approved by the state commission." 47 C.F.R. § 51.323(d)(3). (emphasis added)

In this Issue B9 we discuss whether copper access should be permitted at both of the points requested by MMTP. At Issue E3 we discuss the related issue of whether to order "subloop unbundling," i.e., whether access to a portion of a local loop at an FDI (whether with copper or other facilities) is "technically feasible."

a. Copper Access at FDI Sites

Bell Atlantic raised two specific objections to using copper at sites such as FDIs. Neither of these is a sufficient legal or factual ground for rejecting copper access. The first objection concerns limited conduit space. The FCC ruled that exhaustion of facilities does not constitute technical infeasibility for access to unbundled network elements, if expansion of a site is possible. *Local Competition Order* ¶¶ 198, 201. The evidence shows that expansion to access CALL is feasible. Bell Atlantic agreed that when it needs more conduit space at a site, it builds more conduit. In response to a question on whether there was an impediment to expanding conduit space, Mr. Lear, Bell Atlantic's expert witness, stated that Bell Atlantic already does that today at the requesting CLEC's expense. In addition, Bell Atlantic admitted that there have been no requests for access to loops or collocation at its 864 remote terminal locations serving customers in Maine. In support of using copper as opposed to fiber, Bell Atlantic admitted that one inch of fiber and one inch of copper take up the same amount of inner duct space.

The record establishes that there are at present no demonstrated exhaustion problems. The photographs of spare ducts at FDI sites supplied by MMTP demonstrate that conduit apace is unused or only partially used.[14] Bell Atlantic's admission that one inch of fiber and one inch of copper take up the same amount of innerduct space and MMTP's showing that 100 and 200 pair of copper cables fit into a traditionally sized innerduct (Tr. A-175-6, lines 19-4) indicate that the prospect of conduit exhaustion is not affected by whether MMTP accesses loops with copper rather than fiber.

[14]Mid-Maine Exh. A, photographs 3, 5 and 6, attached to MMTP Brief (October 19, 1998).

Bell Atlantic's other objection is safety. Although the FCC stated that "legitimate threats to network reliability and safety must be considered in evaluating the technical facility of interconnection or access to incumbent LEC networks." It also ruled that to justify refusal to provide access at a particular point or in a special manner, an incumbent LEC "must prove to the state commission, with clear and convincing evidence, that specific and significant adverse impacts would result from the requested interconnection or access." *Local Competition Order* ¶ 203.

47 C.F.R. § 51.321(d) states:

> An incumbent LEC that denies a request for a particular method of obtaining interconnection or access to unbundled network elements on the incumbent LEC's network must provide to the state commission that the requested method of obtaining interconnection or access to unbundled network elements at that point is not technically feasible.

Bell Atlantic has not made the necessary showing. Its claim that the introduction of additional copper into the network will create significant risks of equipment damage and personal injury is not supported by the evidence. Currently almost every customer in the state of Maine is served by a loop that consists partially of copper. The network is therefore already subject to the same risks as CALL, assuming that entities employing CALL conform to reasonable engineering practices, as shall be required by the interconnection agreement. The use of copper in a local loop presents the same electrical risk as the use of copper elsewhere in the network. The fact that some existing inter-company EAS trunks in Maine also use copper without discernible network failure demonstrate that this risk is tolerable. MMTP has no incentive to build a substandard network and states that it will place the cables only within

telecommunications space in conduit or poles, thereby reducing the risk of transient currents.

Bell Atlantic acknowledged that it has been able to manage these same risks by training its personnel and complying with the National Electrical Safety Code (NESC), and other industry requirements. Tr. A-97, lines 9-21. MMTP testified that when its personnel work on the network and ground the cable, they will be trained to comply with the NESC and other industry standards. Tr. A-98, lines 9-14. 35-A M.R.S.A. § 2305-A(2) requires all telephone utilities to conform to the NESC.

Some of the examples listed by Bell Atlantic as creating a risk, if CALL is permitted, do not apply in Maine. Bell Atlantic cites examples of stray currents from rapid transit lines and underground fuel tanks. There are no rapid transit lines (or other electrified rail lines) in Maine. Most of Maine's network is aerial; stray currents from underground tanks will have little or no effect on aerial facilities, so long as the copper being connected does not contain any electrically powered repeaters.

Bell Atlantic's safety objection ultimately amounts to an argument that, because MMTP's use of copper increases the total amount of copper in the network, the total risk is increased proportionally. Bell Atlantic in effect argues that it should be able to use copper, but that no other carrier should be granted the same opportunity. We reject Bell Atlantic's argument. The evidence shows that copper access currently occurs. Bell Atlantic currently deploys copper (loops or copper facilities that run to a digital loop system). Tr. B-153. Copper had also been used to connect a small number of loops in MMTP's service area to BA's loops. Tr. l-60.

Copper is also used at the interface point in some meet point arrangements where BA and independent telephone companies connect to each other's facilities. Tr. l-93.

As discussed in Issue E3 (subloop unbundling) we do not decide at this time the overall question of whether access to subloops at the FDIs is technically feasible, and we defer that decision pending a bona fide request (BFR) process. We do decide here, on the basis of the present record, that there is no technical impediment to copper access to the local loop at FDIs.

b. Copper Access at Serving Wire Centers

Mid-Maine has also requested collocated copper (CALL) at some serving wire centers. Bell Atlantic has raised the same safety and exhaustion concerns concerning the use of copper by MMTP in its central offices as it did for the use of copper at the FDI. They are equally without merit here.

The practice of bringing copper cable into a central office is not novel. In fact, Bell Atlantic currently brings copper into its central offices and there is no reason to suspect that a foreign copper cable will be any more dangerous that a non-foreign copper cable, assuming that each company is following similar construction, engineering and safety standards. Tr. A-97, lines 9-15. See discussion above in connection with CALL at FDIs (Issue E4,a).

The FCC has held that "legitimate threats to network reliability and security" may be considered in evaluating the technical feasibility of interconnection or access. An ILEC "must prove to the state commission, with clear and convincing evidence, that specific and significant adverse impacts would result from the requested

interconnection or access." *Local Competition Order* ¶ 203. Bell Atlantic has not made that showing.

We also reject Bell Atlantic's conduit space exhaustion claims. There is no evidence that there is an exhaustion problem in Bell Atlantic's Maine central offices. There are currently only four collocation locations in the state. Tr. B-160-161. Bell Atlantic data response 01-09. None of the present collocation facilities are north of Portland. Tr. A-161. MMTP has agreed not to use CALL in Bell Atlantic's Portland exchange central offices and will focus its attention on those areas in which no competitor has appeared.

There is no evidence that there is a conduit exhaustion problem in any of the proposed wire centers. Bell Atlantic's expert testified that he was unaware of any central offices in Maine that could not accommodate more conduits. Tr. B-191. Bell Atlantic agreed that despite its claims of exhaustion concerns it has done no study of the issue.

Even when all conduits are full, other options are available. Bell Atlantic testified that it currently honors requests for building new conduit space when requested. It also acknowledged that it has abandoned copper in its network and existing copper could either be removed, or utilized by MMTP, further mitigating conduit exhaustion. Tr. A-158, lines 10-13.

MMTP has also indicated it is willing to agree to reasonable limitations on the use of CALL, including a limitation on the use of interducts that can be used to run copper cables. Because space exhaustion is always a potential with collocation, the FCC established a "first come first served" approach to collocation.

Local Competition Order ¶ 585; 47 C.F.R. § 51.323(f)(1). However, the need to apply that principle should not occur here. The evidence indicates that there is ample interduct space in all central office buildings in areas where MMTP proposes to provide service.

We will not consider Bell Atlantic's argument that it is not economically efficient for MMTP to interconnect via copper. The FCC has ruled that the determination of "technical feasibility" does not include "economic concerns." 47 C.F.R. § 15.5 (definition of "technical feasibility"). CLEC's costs are irrelevant to a determination of technical feasibility. Nevertheless because fiber is more efficient for larger trunk groups we could, if necessary, limit MMTP's use of large amounts of copper where conduit exhaustion is likely to occur. However, the evidence suggests that the economies underlying the use of fiber versus copper will provide adequate incentive for MMTP to migrate to fiber prior to conduit exhaustion, particularly if MMTP must pay for the expense of additional conduits.

B10. SS7 Certification

Signaling System 7 ("SS7") is a signaling system that provides carriers the signaling information that is necessary to establish circuits, provide information, and otherwise process calls. The only issue in dispute here involves whether MMTP or its SS7 service provider must undergo some additional undefined SS7 "certification testing" procedure prior to implementing SS7, if MMTP's SS7 vendor or if Mid-Maine Telecom[15] has already been SS7-certified. It is MMTP's contention that if the switches

[15]Mid-Maine Telephone is the ILEC affiliated with MMTP. Its service territory is north of Bangor.

it uses, or if the SS7 service provider its incumbent ILEC uses are the same as those used by the CLEC, then additional SS7 certification for MMTP is not necessary.

Bell Atlantic has insisted on requiring additional SS7 testing on the ground that a switch that is not SS7 certified should not be serving customers. If MMTP's SS7 service provider or MMTP's ILEC affiliate is already serving customers on an SS7 basis or is exchanging traffic with BA on that basis, and if the new switch type and signaling facilities are the same as those that are already in service and are currently used to exchange traffic with BA, then additional SS7 testing should not be necessary.

BA may require additional SS7 testing only where the switch type or signaling facilities are not the same or are deployed in a different manner.

B12. Rate Center Definition

The only remaining issue here is whether MMTP must seek explicit approval from the Commission to change its rate centers, even if the Commission has generally allowed such a change. MMTP argues that such a requirement will waste both the Commission's and its own time and resources.

We agree with MMTP that the explicit approval requested here by BA is unduly burdensome and redundant of other administrative procedures. We will, however, require MMTP to specifically provide BA with actual notice of any filings (tariff or otherwise) made by MMTP that either directly or indirectly change MMTP's rate, thus centers, thus allowing BA to participate in those proceedings.

B13. Geographically Relevant Points of Interconnection

The issue involves whether and under what circumstances "interconnection points " (IPs) must be within a geographically relevant 25 mile radius of MMTP's switch. The resolution of this issue affects the substantive resolution of a rate issue in Issue A1(iii). The nature of issues concerning geographically relevant interconnection points and trunking responsibility is fully described at Issue A(iii). Until recently, the advisors had been told by the parties that they had resolved these issues except for contract language. On January 29, 1999, the parties indicated they had not resolved the underlying issues, but might be close to a resolution. We are unable to decide these issues now because they have been inadequately explained and briefed by the parties. The parties, however, have agreed that we may address these issues in a state law proceeding that we could open under 35-A M.R.S.A. § 1303, if they are still unable to reach agreement.

E. UNBUNDLED NETWORK ELEMENTS

E3. Subloop Unbundling

A subloop is a portion of a local loop that might be accessible and severable at various points along the loop. One example is the distribution portion of the loop, running from a facilities connection point in a remote facility housing (known as a Feeder/Distribution Interface (FDI)) to a customer's premises.

MMTP seeks access to subloops so that they may provide a fully-copper loop of less than 18,000 feet in order to supply certain customers with xDSL service. As explained in Issue B9 (Use of Copper Facilities), copper is presently the most economically feasible way to provide xDSL service to all but very large customer concentrations in a limited geographic area. BA-ME uses fiber for the distribution

portions of many loops, i.e., between the central office and an FDI, for example. To provide a fully-copper loop to its customers, MMTP needs to have access at or after the point that the copper portion of the loop begins. Even where BA provides a fully-copper loop, if it is greater than 18,000 feet, access at some place along that loop may allow MMTP to provide xDSL service.

The TelAct granted authority to the FCC to establish unbundled network elements (UNEs). In the *Local Competition Order* the FCC established the local loop as a UNE.[16] The FCC declined to establish a subloop as a separate UNE, stating that it did not have enough information to resolve many of the technical objections raised by ILECs. However, it also stated that state commissions in arbitration proceedings could address those questions and had the authority to establish additional UNEs. We address the nature of that authority at Issue E7 (extended loops) below. Specifically, we address whether our authority arises under federal (TelAct) or state law. For the reasons explained in Issue E7, we conclude that we have authority to order an additional UNE under both federal and state law, and we have opened a proceeding under 35-A M.R.S.A. § 1303, for the purpose of deciding whether to establish sub-loops as a UNE that BA-ME must provide to requesting carriers.

Both parties agree that this Commission has the authority to establish a subloop as an additional UNE. They disagree as to technical feasibility and whether the Commission may consider other feasibility (primarily "operational") questions.

[16]As discussed in greater deal at Issue E7, on January 25, 1999, the Supreme Court in *AT&T v. Iowa Utilities Board* reversed the FCC's establishment of seven unbundled network elements.

BA-ME raises an "array" of issues it describes as "technical" and "operational" to the provision pertaining to subloop unbundling. Included in BA-ME's objections is whether its Operations Support Systems (OSS) are capable of dealing with service orders for subloop unbundling.[17]

MMTP argues that the scope of BA-ME's range of objections is too broad, particularly as to OSS issues, and that BA-ME improperly attempts to apply the "technical feasible" standard to the establishment of the UNE itself. MMTP specifically contests some of BA-ME's technical objections, but does not address many others. We will address MMTP's arguments in our discussion below.

We must first address the question of what standards and issues we must decide in order to order an additional UNE. The FCC ruled that a state commission must address the issues stated in 47 C.F.R. § 51.317. That section is derived from 47 U.S.C. § 251(d)(2), which applies to the FCC's decision-making process for establishing UNEs. Under the regulation, a state commission must decide certain issues if the ILEC claims that a potential UNE is proprietary. BA has made no such claim in this case that subloops are proprietary. Separately from the "proprietary" issues, a state commission must decide whether failure to provide the UNE will "impair" the ability of the requesting carrier to provide the services it seeks to offer. "Impairment" was defined in the regulation in the following manner:

> (b) If the state commission determines that it is technically feasible for the incumbent LEC to provide access to the network element on an unbundled basis, the state

[17]We will not repeat here the rather extensive list of concerns raised by BA-ME in its briefs and testimony. They are stated in detail in its Direct Presentation, pp. 31-33, and in its Post-Hearing Brief, pp. 30-34.

> commission may decline to require unbundling of the network element only if:
>
> . . . .
>
> (2) the state commission concludes that the failure of the incumbent LEC to provide access to the network element would not decrease the quality of, and would not increase the financial or administrative cost of, the telecommunications service a requesting telecommunications carrier seeks to offer, compared with providing that service over other unbundled network elements in the incumbent LEC's network.

47 C.F.R. § 51.317(b)(2).

The FCC, in interpreting the statutory requirements of section 251(d))(2), applied virtually the same standards that it ultimately wrote into the regulation that applies to the states. Using those standards, the FCC established seven specific network elements, including the local loop.

We cannot apply the "impairment" standard as defined by the FCC in the regulation it established in 47 C.F.R. § 51.317(b). The Supreme Court, in *AT&T v. Iowa Utility Board* (January 25, 1999) ruled that the FCC, in adopting the seven UNEs under § 51.319, had misinterpreted the "impairment" standard in the statute.[18] The Court stated:

> [The FCC] announced that it would regard the "impairment" standard as having been met if "the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the

[18]The Court also ruled that the FCC had improperly interpreted the "necessary" standard that applies to network elements that ILECs claim are proprietary or have proprietary features. We need not address that aspect of the Court's decision because there is no claim that a subloop is proprietary.

> service a requesting carrier seeks to offer, compared with providing that service *over other unbundled elements in the incumbent LEC's network*," *id*., ¶285 (emphasis added) — which means that comparison with self-provision, or with purchasing from another provider, is excluded. Since any entrant will request the most efficient network element that the incumbent has to offer, it is hard to imagine when the incumbent's failure to give access to the element would not constitute an "impairment" under this standard.
> The Commission asserts that it deliberately limited its inquiry to the incumbent's own network because no rational entrant would seek access to network elements from an incumbent if it could get better service or prices elsewhere. That may be. But that judgment allows entrants, rather than the Commission, to determine whether access to proprietary elements is necessary, and whether the failure to obtain access to nonproprietary elements would impair the ability to provide services. The Commission cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network. That failing alone would require the Commission's rule to be set aside. In addition, however, the Commission's assumption that any increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element "necessary," and causes the failure to provide that element to "impair" the entrant's ability to furnish its desired services is simply not in accord with the ordinary and fair meaning of those terms.

___U.S. _____, Part III,B. The Court also vacated the FCC regulations, 47 C.F.R. § 51.319, that established the seven UNEs. It did not expressly vacate 47 C.F.R. § 51.317, the provision that applies to state determinations of additional UNEs. However, inasmuch as section 51.317 contains the same standard that the FCC improperly used in making its determination, it is obvious that the provision is effectively vacated, and we cannot use it.

Nevertheless, the record in this case does permit us to make certain preliminary findings and rulings. In those preliminary rulings we apply the standard we believe is appropriate, based on the Supreme Court's ruling.

We must consider two separate, albeit related, questions. First, is a subloop a UNE? Second, if it is, is "access" to that subloop technically feasible? In determining whether a portion of the network should be a UNE, MMTP correctly points out that it is not necessary to consider "technical feasibility." The Court of Appeals in *Iowa Board of Utilities,* in interpreting 47 U.S.C. § 251(c)(3) and (d)(2), reversed the FCC's ruling that the FCC and the states must consider "technical feasibility" in determining whether a portion of the network should be offered as an unbundled network element. The Court of Appeals' ruling was not reversed by the Supreme Court. Thus, the only issues the FCC or a state commission must consider are the "proprietary" issues and the "impairment" standard discussed above.

MMTP is correct about the standard for determining whether a piece of the network is a network element, but as a practical matter, it is a small point. The Eighth Circuit also ruled (this time affirming the FCC) that "technical feasibility" does apply to the "access" question that must be addressed under section 251(c)(3). That provision states that ILECs must provide "nondiscriminatory *access* to network elements on an unbundled basis at *any technically feasible point*." (emphasis added). Thus, we must determine whether it is technically feasible to provide access to a subloop at the points that MMTP has requested.

We first address the question of whether BA subloops should be UNEs. The record does not permit us to make that ruling. As discussed above, *AT&T v. Iowa Utilities Board*, states that the proper comparison is not between the requested would-be UNE and some other UNE offered by the ILEC. The proper comparison is the

cost of providing the service using Bell Atlantic subloop versus the cost of MMTP if it were to use its own facilities or facilities it could acquire from sources other than the ILEC for that same subloop. In addition, the cost differential must be more than *de minimis*.[19]

The announcement of a new and critical standard long after the close of evidence and briefing, and within days of the decision in this case, could not reasonably have been anticipated by the parties. Both parties should be provided an opportunity to address the new standard with evidence and argument. The TelAct deadline does not permit that. Accordingly, we will provide the parties with an opportunity in the state law proceeding we have opened under 35-A M.R.S.A. § 1303, where we will order a hearing expeditiously.

[19]We will not attempt to decide now how much that cost differential must be. The Court stated:

> An entrant whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment has perhaps been "impaired" in its ability to amass earnings, but has not *ipso facto* been "impair[ed] . . . in its ability to provide the services it seeks to offer"; and it cannot realistically be said that the network element enabling it to raise its profits to 100% is "necessary." In a world of perfect competition, in which all carriers are providing their service at marginal cost, the Commission's total equating of increased cost (or decreased quality) with "necessity" and "impairment" might be reasonable; but it has not established the existence of such an ideal world. We cannot avoid the conclusion that, if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included §251(d)(2) in the statute at all. It would simply have said (as the Commission in effect has) that whatever requested elements can be provided must be provided.

U.S., Part III.B (footnote omitted).

We note that the record presently establishes the particular type of service that MMTP seeks to offer and the use it would make of BA-ME subloops. What is lacking is any evidence of the costs MMTP would incur if it were to provide the service, or the relevant cost comparison.[20]

We turn now to questions we must address in order to determine whether the access MMTP seeks to BA subloops are at "technically feasible" points.

As noted above, MMTP argues that we cannot consider some of the objections raised by BA-ME that relate to its "operations support systems" (OSS). As discussed in E6 below, until the reversal by the Supreme Court, OSS was a UNE under FCC rules. OSS "Functions" are defined as:

> pre-ordering, ordering, provisioning, maintenance and repair, an billing functions supported by an incumbent LEC's databases and information.

47 C.F.R. § 51.319(f)(1).[21]

The general discussion of the "technically feasible" standard in the *Local Competition Order* ¶¶ 192-206 was far from clear as to whether OSS matters are relevant to a determination whether access to a UNE at a specified point is technically feasible. In describing the comments, the FCC noted that some commenters had proposed Operations Support Systems as a "factor" to be considered *Local Competition Order* (¶ 195) and that other commenters

[20]The record does contain evidence of a comparison between the *relative* costs to MMTP of providing the service with copper versus fiber and electronics, but there was no evidence of actual cost in dollars, and the comparison is irrelevant in any event.

[21]While all of section 51.319 has been vacated by the Supreme Court, we doubt if this description of the kinds of activities that constitute OSS has become inaccurate.

> ask the Commission to make clear that technical feasibility does not require that operations support systems for order processing, provisioning and installation, billing, and other support functions be in place in order to make a specific interconnection point technically feasible.

Local Competition Order ¶ 196. The FCC did not provide a clear answer in its discussion of the "technically feasible" standard. It stated:

> We conclude that the term "technically feasible" refers solely to *technical* or *operational* concerns, rather than economic, space, or site considerations.

Local Competition Order ¶ 198 (emphasis added)

It also stated, however:

> [We do not] believe the term "technical," when interpreted in accordance with its ordinary meaning as referring to engineering and operational concerns in the context of sections 251(c)(2) and 251(c)(3), includes consideration of accounting or billing restrictions.

Id. ¶ 201.

MMTP agrees that "true *operational and technical* issues" are relevant considerations. MMTP's view of "operational" does not appear to extend to most matters that might be considered part of OSS, however.

We find the actual answer to much of the question of whether OSS issues should be considered a "technical or operational" concern in the FCC's discussion that specifically addresses whether the FCC (or the states) should order subloop unbundling:

> Several LECs and USTA, for example, assert that incumbent LECs *would need to create databases for identifying, provisioning, and billing* for subloop elements. Further, incumbent LECs argue that there is insufficient space at certain possible subloop interconnection points. We note

> that these concerns do not represent "technical" considerations under our interpretation of the term "technically feasible."[22]

Local Competition Order ¶ 390**.**

Whether this passage addresses every single potential OSS concern, it addresses at least objections such as the following from BA's briefs:

> Fourth, the operations support system and operational practices in existence today would require substantial modifications to support mid-Maine's unbundling proposal. A basic premise underlying all of BA-ME's operations is that a loop is ordered and installed all the way from the central office to the end user's location. Sub-loop unbundling would change this fundamental principle. With different beginning and end points for sub-loop facility, extensive software development would be required to modify operations systems involved with service orders, equipment inventory, facility assignment, customer records, testing, trouble reports, and physical plant records.

B-A Direct Presentation at 31.

> And these are just and provisioning impediments. Perhaps a more fundamental, threshold issue is how does a CLEC even order a subloop? BA-ME has no mechanized database with which to inventory subloops. All of BA-ME's existing pre-ordering and ordering systems have been designed for service on an end-to-end basis. Thus, BA-ME cannot readily answer the most basic CLEC inquiry: whether a particular customer is even served through an FDI.

B-A Post-Hearing Brief at 33.

Local Competition Order ¶ 390, quoted above, specifically addresses BA's objection (Post-Hearing Brief at 31) that "Space limitations within FDI cabinets alone renders subloop unbundling technically infeasible." See also *Local Competition*

[22]We have omitted the FCC's footnotes to this passage. In those omitted footnotes, NYNEX is among the LECs identified as making the assertions described in the first sentence of the quoted passage. Both NYNEX and Bell Atlantic are identified as making the argument described in the second sentence.

Order ¶ 201. We note, however, as did the FCC, that if there is insufficient space at a particular location, the need to build a new facility, at MMTP's expense, may be far more relevant to MMTP than a ruling that lack of space does not constitute technical infeasibility.[23]

MMTP points out that if OSS problems can be raised as a legitimate objection to ordering of new UNEs, it would be impossible for the FCC or state commission ever to order a new UNE. If Bell Atlantic has designed an OSS that is so inflexible that it does not readily accommodate the ordering and implementation of new UNEs, that defect should not and cannot be used as an excuse against the establishment of new UNEs. CLECs and other requesting carriers should not be penalized by poor planning by ILECs, or by the failure by an ILEC to recognize that the FCC and state commissions can and will establish additional UNEs.

Many of BA-ME's technical objections do not relate to OSS. We would not expect to be able to resolve those concerns solely on the basis of the briefs and testimony. BA-ME stated in its briefs:

> The only way to investigate, test, and evaluate these issues is through joint Mid-Maine/BA-ME technical and operational field tests as part of the BFR process. BA-ME is willing to pursue this BFR work if Mid-Maine is similarly willing to commit resources to the effort. Without further detailed

[23]The FCC stated:

> Of course, a requesting carrier that wishes a "technically feasible" but expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit.

Local Competition Order ¶ 199.

> technical definition and development by both parties (and equipment vendors), the specifics of how to provide sub-loop unbundling, and the related costs to maintain the reliability and security of both carriers' networks, and provide a quality service, cannot be known.

BA Direct Presentation at 33.

> The Bone [sic] Fide Request (or BFR) process is the means by which any CLEC may request a customized network arrangement not generally offered or available from BA-ME. The BFR process is roughly analogous to BA-ME's retail practice of "special assembly" or "individual case basis." It is a practical, administrative vehicle to assess whether a CLEC's individualized request can be accommodated by BA-ME, in whole or in part. In essence, the BFR process calls for BA-ME to evaluate the CLEC request and report back whether and how the request can be accommodated and what the applicable cost to the CLEC would be for the customized arrangement. The BFR process has been recognized by the Maine Commission [in the BA-AT&T arbitration] as the appropriate vehicle for pursuing greater network unbundling.

BA Post-Hearing Brief at 36.

BA cites several cases that it claims ordered a BFR process for determining the feasibility of various unbundling requests.

MMTP's position on whether to use the BFR process is not entirely clear. Its Combined Brief states that several commissions have ordered subloop unbundling and that many of those required a BFR process. MMTP does not specifically object to the use of the BFR in its discussion of this issue. Nor does it otherwise object to BA's BFR process as a whole.[24]

[24]The issue we consider in P1 below is not the validity of the process itself, but whether it must be applied when it has already been applied to an identical or nearly identical network element or service.

MMTP does express a concern at n. 126 of its Combined Brief about the length of time that a BFR process might take. It stated similar concerns in the January 11 telephone conference with BA and the advisors. That conference also discussed the possibility of a BFR process that would be supervised or monitored by Commission Staff. As described below we will order a BFR process if necessary.

In the event that we subsequently decide that a subloop is a UNE, pursuant to the proceeding under 35-A M.R.S.A. § 1303, it will then be necessary, also in the section 1303 proceeding, to address the question of access at technically feasible points. Here we will indicate the approach that we will take if we make the first finding. We would order MMTP and BA-ME to participate in a bona fide request process to determine the technical feasibility of access at the points requested by MMTP, subject to the following conditions:

1. The parties will conduct a BFR process at least two locations, unless they agree to only one location

2. The advisors assigned to this case will monitor the process. They will also have the authority to establish reasonable deadlines for various stages in the BFR process, to extend deadlines for cause and resolve other procedural disputes between the parties.

3. For good cause, the Commission may delegate further supervisory power to the advisors.

Even in the state proceeding, we are bound to apply controlling federal law. Thus, following the BFR process, Bell Atlantic, as provided in 47 C.F.R. § 51.321(d), must prove that access is not technically feasible:

> An incumbent LEC that denies a request for a particular method of obtaining interconnection or access to unbundled network elements on the incumbent LEC's network must prove to the state commission that the requested method of obtaining interconnection or access to unbundled network elements at that point is not technically feasible.

E6. OSS Provisioning and Interface (access to OSS)

In the *Local Competition Order,* ¶ 518, the FCC ruled that ILECs' Operations Support Systems (OSS) are an unbundled network element (UNE). OSS "functions consist of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information." C.F.R. § 47.319(f)(1). The FCC based its ruling that OSS are a UNE on the definition of "network element" in the TelAct:

> (29) NETWORK ELEMENT. The term "network element" means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

37 U.S.C. § 153(29).

The FCC's conclusion that UNEs consist of much more than "physical facilities and equipment used to provide local phone service" was upheld by the Supreme Court in *AT&T v. Iowa Utilities Board*, ____ US ____, III,A. The Supreme Court vacated the FCC's establishment of all UNEs, including OSS. ___ US ____ III,B. For the purpose of the issue we consider here, we will assume that the FCC will reestablish OSS as a UNE pursuant to the standards required by the Supreme Court,

based on the Court's reading of 47 U.S.C. § 251(d)(2). If the FCC fails to reestablish OSS as a UNE, then, of course, our decision here cannot apply.

Bell Atlantic has proposed that the interconnection agreement include a provision stating that BA-ME is obligated to provide access to OSS "as required by applicable law." MMTP argues that the interconnection agreement should provide that access to OSS shall be provided pursuant to the rulings and results of the ongoing proceeding before the New York Public Service Commission (NYPSC) that is addressing many of the details of OSS access. We agree with MMTP. As the *Local Competition Order* ¶ 518 (quoted above) indicates, OSS and access to OSS present issues of great complexity. By contrast, the unbundling of elements such as loops, NIDs and interoffice transmission facilities, and the access to those elements, is technically far simpler. The FCC's order and regulations state only a general requirement that requesting carriers be provided with access to ILECs' OSS. In reaching its conclusions in the *Local Competition Order,* the FCC drew heavily on the existing experience of ILECs, CLECs and state commissions. The FCC particularly noted the ongoing efforts of the New York Commission.

Bell Atlantic argues:

> The Commission should reject Mid-Maine's request. It is BA-ME's understanding that incorporation of the results of the New York proceeding, in whole or in part, is not required under applicable law, and, to the extent that such incorporation is required under applicable law, then BA-ME would have already contractually obligated itself to apply such results to its OSS systems in Maine by virtue of having agreed to comply with applicable law. Accordingly, Mid-Maine's language is, at best, surplusage and, at worst,

> an impermissible burden on BA-ME. Of course that is not to say that BA-ME will not apply some or all of such results in Maine to the extent that it determines, in its discretion, that such application would be a prudent business decision.

We agree with Bell Atlantic that "incorporation of the results of the New York proceeding . . . is not *required* under applicable law"[25] (emphasis added). We do not read BA's argument as suggesting that it would be unlawful for this Commission to order those results incorporated. Congress has allowed requesting carriers (e.g., CLECs) and ILECs to reach interconnection agreements under the Telecommunications Act. Where the parties cannot agree, Congress has required state commissions to resolve the differences between the parties.

The practical difficulty with Bell Atlantic's position is that "applicable law" in this context means essentially nothing more than the general requirement established by the FCC. After the Supreme Court's decision, even that requirement no longer exists, at least temporarily. An interconnection agreement that references only "applicable law" would be totally silent on the essential matter of the details of access to OSS. If we were to impose only the requirement recommended by BA-ME, it is almost inevitable that the parties would be back before us requesting us to adjudicate the details of OSS access. In this proceeding, Bell Atlantic has proposed no specific details of OSS access that we could include in the interconnection agreement. Bell Atlantic has had, and will have, a full opportunity to litigate the details of access to OSS in the New York proceeding.

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[25]Because the New York results could never automatically be part of the "applicable law" of Maine, BA's argument that the New York results would apply" [t]o the extent that such incorporation is required under applicable law," has no practical value to MMTP or to this Commission.

As the FCC noted:

> As a practical matter, the interfaces developed by incumbents to accommodate nondiscriminatory access will likely provide such access for services and elements beyond a particular state's boundaries, and thus we believe that requirements for such access by a small number of states representing a cross-section of the country will quickly lead to incumbents providing access in all regions.

Local Competition Order ¶ 524.

MMTP argues that it does not make sense for this Commission or these parties to "reinvent the wheel." Recasting the analogy slightly, we see no good purpose to requiring this Commission to invent a different wheel. As the FCC has indicated, using the results of the New York proceeding has the benefit of possible uniformity among states, which could benefit both BA and carriers who will be CLECs in more than one state.

Bell Atlantic has presented no argument that the results in New York are likely to be inapplicable in Maine or unreasonable for Maine. There is no good reason not to order that the interconnection agreement between BA-ME and MMTP incorporate the results from the OSS proceeding before the NYPSC.[26]

E7. **Combinations, Including Extended Link**

MMTP, at least at present, plans to place a relatively small number of switches in the State of Maine. That limited number of switches will provide switching functions to customers in all locations in Maine to which MMTP will provide local exchange service. To provide local exchange service, MMTP must provide local loops

[26]If for some reason the NYPSC makes rulings that are clearly impossible to implement in Maine or are inappropriate for Maine because of factual or operational differences, BA may request us to reconsider and amend our order.

that extend from its switches to its customers' premises, it build its own loops or purchase them from BA-ME. A local loop is an unbundled network element (UNE) established by the FCC pursuant to 47 U.S.C. § 151(c)(3) and (d). *See* 47 C.F.R. § 51.319.[27]

Within the area that MMTP plans to serve, it will have substantially fewer switches than does Bell Atlantic. In fact, Bell Atlantic usually has at least one switch in each of its exchanges.[28] Because BA-ME generally has one or more switches in every exchange in the State, and because local loops by definition normally do not transcend exchange boundaries, Bell Atlantic's loop lengths are relatively short compared to the loop facilities that MMTP will need for its customers that are located long distances from its smaller number of switches. In many cases, Bell Atlantic does not have available for purchase the kind of local loops that cross its exchange boundaries need to satisfy MMTP's needs for its far-distant customers.

In order to provide service in the manner described above, MMTP wishes to purchase two separate unbundled network elements (a "local loop" and an "interoffice transport facility") and connect them together as an "extended link" or "extended loop." Both of those UNEs were established by the FCC in the *Local Competition Order*. *See* 47 C.F.R. § 51.319. A "local loop" runs between a Bell

[27]47 C.F.R. § 51.319(a) defines a "local loop" as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and an end user customer premises." *See* discussion of the U.S. Supreme Court's vacation of this regulation below.

[28]**EXAMINER'S NOTE:** Some of the facts stated in this Part may not be in evidence. If the parties do not object to any fact stated in this Part, the Commission may adopt them as factual findings.

Atlantic wire center and a customer's location. An "interoffice transmission facility" runs from one BA wire center to another, for example, from the BA wire center that is located in the vicinity of MMTP's switch to the BA wire center at which the proposed loop to the customer is located. An interoffice transmission (or transport) facility can be dedicated to one carrier or shared among carriers. 47 C.F.R. § 51.319(d)(1).[29] It is capable of being used for local or toll trunking, or in a dedicated manner as a private line, as the private line component of foreign exchange service. Finally, as MMTP intends in this case, it could be used as a component of an extended loop. MMTP plans to connect an "interoffice" transmission facility and a local loop to form an "extended loop" running from MMTP's switch to MMTP's customer.

One immediate and very important problem for MMTP is that the US Supreme Court has vacated that portion of the FCC *Local Competition Order* and associated regulations (47 U.S.C. § 51.319) in which the FCC established local loops, interoffice transmission facilities and five other portions of ILEC's networks as unbundled network elements. *See* discussion of *AT&T v. Iowa Utilities Board* at Issue E3 above. For the remainder of the discussion of this Issue E7 (extended links) we will assume that the FCC reestablishes access to local loops and interoffice transmission facilities as UNEs. In the alternative, we will assume for discussion

[29]47 C.F.R. § 51.319(d)(1) defines "interoffice transmission facilities" as:

> incumbent LEC transmission facilities dedicated to a particular customer or carrier, or shared by more than one customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.

purposes that we will consider establishing those two UNEs in the state law proceeding (described below) that we open pursuant to 35-A M.R.S.A. § 1303, if BA-ME objects to providing local loops, interoffice transmission facilities or any other UNE previously ordered by the FCC.

We do not need to address here whether MMTP's plan to use a smaller number of switches is efficient, or whether it is more or less efficient than various alternatives. For an entity building a new network, such a configuration may, or may not, be more efficient than deploying multiple switches with standard loops. It is clear, and relevant, that MMTP, at least at this stage of its planning, apparently believes that using a small number of switches is a more efficient way to proceed, even if in some instances it would have to build longer loops of its own or obtain extended loops from BA-ME.

The issue we must address is how or if MMTP will be able to connect the two UNEs: (1) the interoffice transport facility that terminates at the BA wire center located in the vicinity of its customer; and (2) the loop running from that same wire center to the MMTP end user, so that the two UNEs combined will provide an extended loop.

In addressing this question we must consider several issues. First, does the TelAct, as presently construed, require ILECs to connect UNEs that not presently connected? We find that the answer is no. Second, do state commissions possess independent authority *under the TelAct* to require ILECs to connect UNEs that are not presently connected? Again, we think the answer is probably no, although we find that we do not need to decide that question. Third, do state commissions have independent

authority under the TelAct, in arbitration proceedings pursuant to the TelAct, to require UNEs in addition to those that the FCC has required? We rule that the answer to that question is yes.[30] Fourth, does a state commission have independent authority under state law to order additional UNEs? We rule below that it does, and we open a state proceeding for that purpose. Fifth, may a state commission in an arbitration proceeding order that an ILEC must provide the cross-connect arrangement as a matter of "virtual collocation." We decide that there is not a sufficient factual basis in this proceeding to make that ruling.

Related to all of these questions are questions of federal preemption. First, are state commissions preempted from ruling that the *TelAct* requires ILECs to combine UNEs? We believe the answer is yes. Second, are state commissions preempted from ruling that the TelAct requires ILECs to provide an additional UNE, or that they must provide virtual or actual collocation? We decide the answer is no. Third, does anything in federal law preempt state commissions, acting under state law, from ordering an ILEC to provide an additional UNE or virtual or actual collocation? Again, we decide no. Fourth, are state commissions preempted from requiring ILECs, pursuant to state law, to *combine* UNEs? We believe the answer to that question is no.

[30]Related to the third question is the further question of whether, given that present state of the law is that the FCC has not established any UNEs whatsoever, a state commission, in an arbitration proceeding under the TelAct, has the authority to establish UNEs other than those described in question 3. Again, we believe the answer is probably yes, although we also do not decide that question in this Order. As noted above, if Bell Atlantic decides that it will contest the provision of local loops, interoffice transmission facilities or any other UNEs formerly established by the FCC, we will, if necessary, consider whether we may order such UNEs pursuant to our proceeding under 35-A M.R.S.A. § 1303.

We address first the question of whether the TelAct requires ILECs to combine network elements that are presently not combined.

The FCC in the *Local Competition Order* ruled that ILECs must, upon the request of a CLEC or other "requesting carrier," connect two UNEs together. 47 C.F.R. § 51.315(c). That particular subsection states:

> (c) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network, provided that such combination is:
>
> (1) technically feasible; and
> (2) would not impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

Other subsections of 47 C.F.R. § 51.315 addressed related issues concerning combining or separating UNEs.

The Eighth Circuit in *Iowa Utilities Board* reversed the FCC and vacated *all* of 47 C.F.R. § 51.315. Thus, for most of the duration of this case, the parties reasonably assumed that the TelAct did not require ILECs to combine separate UNEs.

For reasons that are unclear, the Supreme Court, in *AT&T v. Iowa Utilities Board*, did not address the issue of the validity of section 51.315(c). The Eighth Circuit's ruling; vacating the regulation, was therefore undisturbed.

The Supreme Court did, however, address the validity of section 51.315(b).[31] While section 51.315(c) requires ILEC's to combine two elements

[31] 47 C.F.R. 51.315(b) states:

> Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines.

that were not presently combined, section 51.315(b) prohibited them from splitting apart two elements that were presently already combined.[32] The two subsections are obviously related: both involve the question of whether UNEs must or must not be combined. The chief difference between the two provisions is that subsection (b) (now again effective) would require ILECs to preserve the *status quo*, and subsection (c) (still ineffective) would require ILECs to alter the *status quo*. The Court ruled that section 51.315(b) was a valid exercise of the FCC's power under the TelAct.

Section 251(c)(3) of the TelAct states (in part):

> An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

The Supreme Court ruled:

> Because this provision [section 251(c)(3)] requires elements to be provided in a manner that "allows requesting carriers to combine" them, incumbents [ILECs] say that it contemplates the leasing of network elements in discrete pieces. It was entirely reasonable for the Commission to find that the text does not command this conclusion. It [section 251(c)(3)] forbids incumbents to sabotage network elements that are provided in discrete pieces, and thus assuredly contemplates that elements may be requested and provided in this form (which the Commission's rules do not prohibit). But it does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form.

____ U.S., ____, Part III.D.

The Court also stated:

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[32]We have heard that the FCC did not appeal the particular ruling concerning section 51.315(b) to the Supreme Court, but have not been able to confirm that report.

> The reality is that § 251(c)(3) is ambiguous on whether leased network elements may or must be separated, and the rule the Commission has prescribed is entirely rational, finding its basis in § 251(c)(3)'s nondiscrimination requirement. As the Commission explains, it is aimed at preventing incumbent LECs from "disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants." Reply Brief for Federal Petitioners 23.

Id.

The Eighth Circuit, when it vacated *all* of section 51.315, relied on the exact same statutory language in section 315(c)(3), thus agreeing with the ILECs. There would appear to be little logical reason to distinguish between sections 51.315(b) (now valid) and 51.315(c) (still unlawful). We might reasonably assume that if the Supreme Court had reached all of the "UNE combined" issues of section 51.315, it would have upheld the validity of section 51.315(c) along with 51.315(b). Nevertheless, the present state of the law is that 47 C.F.R. § 51.315(c) is not in effect.

BA argues that the 8th Circuit decision means that under the TelAct a CLEC must provide its own means of connection. It argues further that TelAct preempts any state commission decision that would require an ILEC to provide such a connection. MMTP argues that the provisions of the TelAct and the *Iowa Utilities Board* decision do not preempt the states from deciding, pursuant to state law, that a LEC must connect two separate UNEs established by the FCC.

From an engineering perspective, the most efficient way to connect the two UNEs is through a “cross-connect” arrangement. The ILEC's local loop is connected to the distribution frame of a central office; its interoffice transport facilities

terminate elsewhere on the distribution frame. BA testified that to combine a local loop to an interoffice transport, a CLEC would use cross connects to connect first the loop and the multiplexor, and then the multiplexor and the interoffice trunk.[34] BA argues, however, that under the law, as established by the 8th Circuit decision, a CLEC must connect two UNEs itself, using its own facilities. Bell Atlantic argues that it is not required to connect the two UNEs with a cross-connect arrangement, and argues that MMTP must instead connect the two UNEs with its own facilities through "collocation" in BA's central offices.

"Collocation" is defined and required by TelAct section 251(c)(6), 47 U.S.C. § 251(c)(6), which states that ILECs have:

> The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

Both of the parties' briefs apparently assume that collocation requires certain characteristics (e.g., a secure "cage" with electric power) that is plainly more expansive and more expensive than the simple cross-connect arrangement that provides a "technically feasible" means of access to the UNEs.

It is not clear to us why the parties treat "collocation" effectively as a term of art that connotes certain minimal technical and spatial requirements.[35] It is not

[34] *See* Tr. B-194.

[35] Bell Atlantic agreed at the hearing that "collocation" is not a "code word" for "cage," but its briefs appear to assume the contrary.

obvious why MMTP could not place its own cross-connect facilities on the distribution frame as a form of collocation or virtual collocation. We will address those issues below.

We decide that we have the lawful authority under both the TelAct and the law of Maine to establish unbundled elements and, if we find that access to such elements is "technically feasible," to order BA to provide such elements. Specifically, we find that the cross-connect arrangement described above is a UNE. As described below, we also make alternative rulings under the TelAct and our own authority.

We decide that we have authority to order an additional UNE under both the TelAct and state law. As applied below, there is no substantive difference between the requirements of state and federal law.

We consider first our authority under the TelAct. Nothing in the TelAct states that the FCC has exclusive authority over designating UNEs. Nothing in the TelAct states that state commissions in TelAct arbitration proceedings have no authority to order additional UNEs. Indeed, section 252(b)(4)(C) requires state commissions in arbitration proceedings to decide all issues presented in the arbitration petition, and section 252(c)(1) requires commissions to ensure that their resolutions of those issues "meet the requirements of section 251, including regulations prescribed by the Commission [FCC] pursuant to section 251." One of the specific requirements of section 251 is contained in subsection (c)(3). It requires ILECs to provide "access to network elements on an unbundled basis at any technically feasible point . . . ." Section 251 does not even expressly require that the FCC designate UNEs, although its authority to do so is clear, because section 251(d)(2) states the standards the FCC

must consider in establishing UNEs. We conclude that state commissions have parallel authority with the FCC to order additional UNEs pursuant to sections 251(c)(2), 252(b), and 252(c) of the TelAct. Of course, like the FCC, whose seven UNEs were vacated by the Supreme Court, we must apply the standard for determining the "necessary" and "impairment" standards that is required by the Supreme Court.

In reaching our conclusions that we have authority under both the TelAct and state law to order additional UNEs, we place little weight on the FCC's similar conclusion, largely because of internal inconsistency in its apparent reasoning.

The FCC in the *Local Competition Order* and in 47 C.F.R. § 51.317 ruled specifically that state commissions, in arbitration proceedings under the TelAct, may order ILECs to provide UNEs beyond the "minimum" list the FCC itself ordered in now vacated 47 C.F.R. § 51.319. Indeed, 47 U.S.C. § 51.317 requires a state commissions in arbitration proceedings to order additional UNEs unless it makes certain findings specified in that section. The FCC further recognized that a state commission in an arbitration proceeding may confront issues that are unique to that state and that state commissions possess "significant expertise." *Local Competition Order*, ¶¶ 244, 288. This aspect of the *Local Competition Order* and associated regulations was not challenged in the Eighth Circuit or in the Supreme Court. Thus, the FCC's decision on that point effectively has been upheld.[36]

[36]As discussed above at Issue E3, the Supreme Court ruled that the FCC did not correctly follow the requirements of 47 U.S.C. § 251(d)(2) in establishing its list of 7 UNEs. The Court expressly vacated 47 C.F.R. § 51.319. As noted above, it also effectively vacated 47 C.F.R. § 51.317(b), because that rule, applicable to states when they establish UNEs, stated the same flawed standards (purportedly based on section 251(d)(2)) that the FCC had applied to its own decision.

Nothing in the Court's decision provides any indication that 47 C.F.R. §

As indicated above the basis (or bases) for the FCC's ruling contains internal inconsistencies. The *Local Competition Order* stated that states have the authority to order additional UNEs pursuant to *state law*. To support this proposition, the FCC relied on 47 U.S.C. § 252(e)(3), which states:

> (3) PRESERVATION OF AUTHORITY.--Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its *review* of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(emphasis added)

We note first that section 252(e) generally addresses the "review" stage of state commission proceedings. By definition, the "review" stage occurs *after* the "negotiation" or "arbitration" stages of state Commission proceedings under section 252.[37] Notwithstanding that stated basis, however, elsewhere the Order appears to refer to TelAct sections, primarily 47 U.S.C. § 251(d)(2), as the basis for the FCC's and state commissions' authority to order UNEs. *Local Competition Order*

51.317(a) should be considered effectively vacated; that subsection's standard for determining "technical feasibility" of "access" to a UNE was unchallenged and therefore remains fully valid under the Act.

More importantly, subsection (a) states the FCC's ruling that state commissions must "determine what elements should be made available" . . . beyond those ordered by the FCC. That portion of the regulation remains valid because it was unchallenged.

[37]In the "review" the state commission may reject a negotiated agreement if it discriminates against a carrier that is not a party to the agreement or is inconsistent with the public interest; it may reject any arbitrated agreement if it does not meet the requirements of section 251 or the pricing standards of section 252(d).

Section 252(e)(1) requires a state commission to "review" an interconnection agreement "adopted by . . . arbitration" even though the same state commission has already "resolved" each issue in the arbitration under section 252(2).

¶¶ 281-283. Moreover, 47 C.F.R. § 51.315 *requires* state commissions to consider establishing UNEs beyond those ordered by the FCC, indicating that state commissions do so "for the purposes of section 251(c)(3) of the Act," and that they must follow the vacated standards in subsection (b) that were purportedly based on section 251(d)(2) of the Act. That the FCC assumed it could write a regulation *requiring* state commissions to establish an additional UNE, under federal law standards, is hardly consistent with a theory that states order additional UNEs under state law. Some states may have no law that would allow them to order an additional UNE; the FCC has no authority to create such state law. As stated above, we have concluded independently that we have authority to consider these issues pursuant to both state and federal (TelAct) law.

As far as the state law proceeding is concerned, initially, we must discuss the procedural aspects of establishing an additional UNE pursuant to state law in the course of an arbitration required by federal law. As discussed above, 47 U.S.C. § 252(e)(3) provides that a state commission may apply state law in the course of its *review* of an arbitrated agreement. Even aside from the problem of whether that provision applies to the arbitration stage of proceedings under section 252, there is no indication that Congress intended the TelAct to preempt state proceedings and procedural requirements.

In our ruling below, we find that Bell Atlantic's refusal to provide cross connects between an interoffice transport facility and a loop is an unreasonable act or practice under 35-A M.R.S.A. § 1306. In order to make that finding, however, we also decide that it is advisable to apply the procedural requirements required by Maine law if

we are to make that determination under 35-A M.R.S.A. § 1306. We therefore open our own investigation under 35-A M.R.S.A. § 1303.

MMTP filed a request to commence such an investigation pursuant to sections 1302(3) and 1303 on October 16, 1998. That request was assigned Docket No. 98-806. The Hearing Examiner asked the parties in a telephone conference in December if it would be acceptable to address whether to open such an investigation in the Examiner's Report, once it became clearer to the advisors, after consideration of all the issues, that such an investigation might be necessary. Both parties agreed the matter could be addressed in the Examiner's Report. Having considered the bases for the FCC's determination that state commissions in arbitration proceedings could establish additional UNEs, the Examiner recommended that the Commission open an investigation pursuant to 35-A M.R.SA. § 1303 for the purpose of addressing the issues in Issues E3 and E7. We agree with the Examiner's recommendation and we open that investigation.[38]

We find that the arbitration procedure has provided the parties the procedural rights required under 35-A M.R.S.A. §§ 1304 and 1305, including an opportunity to present evidence and argument that addresses the § 1306 standard (unreasonable act or practice). For in Issue E3, although not necessarily for this Issue E7, we find that it is necessary to conduct further proceedings to address

[38]As in *CTC COMMUNICATIONS CORP., Request for Commission Investigation Into Unlawful and Unjust Practices and For an Award of Civil Damages and Civil and Criminal Penalties Against Bell Atlantic-Maine*, Docket No. 98-208, Order Addressing Jurisdictional Issues (May 18, 1998), we decline to address whether one public utility may bring a complaint as of right against another utility under 35-A M.R.S.A. § 1302(3). Addressing that issue is unnecessary here as well because we decide on our own motion to open an investigation under section 1303.

unresolved issues. We do so in the section 1303 proceeding because of time constraints under the Tel Act.

We decide that Bell Atlantic's refusal to provide a cross-connect arrangement as an unbundled network element that may be used to connect two UNEs established by the FCC, local loops and interoffice transport facilities that terminate at the same wire center, is an unreasonable act or practice within the meaning of 35-A M.R.S.A. § 1306.

We also decide, pursuant to the TelAct, 47 U.S.C. § 251(c)(3) and 47 C.F.R. § 51.317, that a cross-connect arrangement, that is necessary to connect a local loop and an interoffice transport facility located in the same wire center, is an unbundled network element and must be made available to a requesting telecommunications carrier pursuant to 47 C.F.R. § 251(c)(3) at a price that is consistent with 47 U.S.C. § 252(d).

We must first find that the requested UNE is part of the ILEC's network. An unbundled network element (UNE) is defined (in part) as "a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. § 153(29). ILECs have the duty to provide UNEs to "requesting telecommunications carriers." 47 U.S.C. § 251(c)(3). An ILEC must provide UNEs and access to UNEs that are equal in quality to those it provides to itself. 47 C.F.R. § 51.311(b). We believe that implicit in these definitions and requirements is that for a piece of equipment to be a UNE, it must be something the ILEC provides to itself for use in its own network. Testimony at the hearing establishes that BA-ME itself connects it loops to its interoffice transmission facilities in its wire centers either directly or through cross-connect arrangements, e.g.,

when it provides foreign exchange service, private lines that begin and end in different exchanges and for some forms of special access. Tr. B-191-198.

In considering whether to establish an additional UNE, the FCC regulations require a state commission to decide the issues stated in 47 C.F.R. § 51.317. Under 47 C.F.R. § 51.317(a) a state commission must first determine that it is technically feasible for the ILEC to provide access to the network element in question on an unbundled basis. We find that it is technically feasible for Bell Atlantic to provide access to a cross-connect arrangement including any necessary multiplexers. Under 47 C.F.R. § 51.317(b) we must then consider the "necessary" and "impairment" standards. As discussed above, subsection (b) effectively has been vacated by the Supreme Court. We therefore will instead apply the standard we understand the Supreme Court to have ordered, as explained in Issue E3 above.

As in the case of subloops discussed in Issue E3, BA makes no claim that the cross-connect arrangement is proprietary. We therefore consider whether MMTP's ability to provide the service it seeks to offer, from its switch to its customer, is materially *impaired* by BA's refusal to provide the requested UNE. MMTP of course could obtain the raw components of the UNE, the cross-connect wires and any associated electronics itself, and may well be able to do so at a cost comparable to BA-ME's. We do not view that cost comparison as the correct way to approach this issue.

Essentially, MMTP cannot provide the UNE itself, as it has no way to obtain access to BA wire centers to place the UNE in a functional configuration that will provide the service it proposes. Based on a comparison of the unknown cost to MMTP,

because of the impossibility of obtaining the UNE itself, versus BA-ME's known cost, we conclude that MMTP cannot provide the cross-connect arrangement more cheaply than can BA-ME (i.e., MMTP's cost would far exceed BA's), and we establish the cross-connect arrangements as a UNE that BA-ME must provide to MMTP so that MMTP may use it with other UNEs in the incumbent LEC's network, to provide the service MMTP proposes.

Because we have made the rulings and findings described above, we see no need to address the arguments of both the parties concerning whether we may order Bell Atlantic to provide a cross-connect arrangement as a form of collocation, or to allow MMTP to provide the equipment that BA-ME would use for a cross-connect arrangement as a form of virtual collocation.

We next consider Bell Atlantic's argument that the TelAct, as interpreted by the Court of Appeals in *Iowa Utilities Board,* preempts states from ordering ILECs to connect separate UNEs. As we have discussed above, state commissions clearly have the lawful authority to order additional UNEs in arbitration proceedings, and because the authority to establish a UNE and decide whether access is technically feasible is so independent of the purported authority, to require ILECs to combine UNEs, that was reversed by the *Iowa Utilities Board* decision, we do not need to address Bell Atlantic's argument in detail. Bell Atlantic's preemption argument is based on a ruling by the Court of Appeals that the FCC rule, requiring ILECs to connect separate UNEs, was not permitted under TelAct, section 251(c)(3). The Eighth Circuit ruling was based on a different power under the Act. Our decision is based on the separate authority under the Act to require additional UNEs. That a result that is prohibited under one law or

legal theory turns out to be possible under another does not compel a conclusion that the prohibition under one legal theory preempts the result under the other legal theory. The two rulings are distinct. They are both based on different provisions of federal law and must coexist, even if a result that might be prohibited under one would be allowed under the other.[39] Federal law may preempt inconsistent *state* law, but one ruling that interprets *federal* law cannot "preempt" another interpretation of federal law, even if the second ruling has the effect, in some cases, of weakening the effect of the first ruling. Only a decision under state law that ordered an ILEC to connect two of the UNEs established by the FCC regulations would arguably be preempted by the *Iowa Utilities Board* decision.[40]

As discussed above, we have also ruled that BA-ME must provide a cross-connect arrangement as a UNE pursuant to state law. The issue as to whether

[39]The same cross-connection arrangement between two UNEs might constitute either a "connection" between two UNEs (that the TelAct as interpreted by the Eighth Circuit does not require an ILEC to make), or a UNE that either the FCC or a state commission may order an ILEC to provide. There might be other facilities or equipment, for example something that does not exist in an ILEC's network, that could only be a "connection" and could not be a UNE.

[40]Bell Atlantic's preemption argument is one that in any event is fairly debatable. As discussed above, the primary basis for the Court's ruling that the TelAct does not require ILECs to connect or combine UNEs is the language of section 251(c)(3), stating that ILECs shall provide UNEs in a manner that allows requesting carriers to combine them. Bell Atlantic bases its preemption argument primarily on what appears to be a secondary basis for the decision of the Court of Appeals: that requiring ILECs to combine separate UNEs would "obliterate the careful distinction Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other." The Supreme Court, in considering the validity of 47 C.F.R. § 47.315(b) (which prohibits ILECs from splitting apart UNEs that are presently connected) disagreed.

federal law or federal ruling may preempt state law is obviously rather different than whether there can be two co-existing federal rulings that conflict, as discussed above. We find that state commissions have the authority, under state law, to require ILECs to *combine* UNEs, i.e., the very activity that the Eighth Circuit Court of Appeals stated the FCC could not order under the TelAct. While such rulings seemingly more clearly implicate preemption issues than do federal rulings, we agree with other commissions' reasoning that the federal TelAct section 251(c)(3) does not *require* ILECs to combine separate UNEs. That is substantially different ruling than one that federal law *prohibits* ILECs from connecting UNEs. The language of section 251(c)(3) certainly does not prohibit combinations and says nothing about state authority. The Supreme Court clearly agreed that section 251(c)(3) does not prohibit the combining of elements when it reversed the Court of Appeals ruling concerning 47 C.F.R. § 47.315(b) (splitting combined UNEs).[41] State commissions that have addressed this question have ruled that nothing in the Eighth Circuit's decision provides any indication that a state law requirement to combine elements would be preempted.[42]

G. COLLOCATION

[41]The Supreme Court stated that section 251(c)(3) "does not say, or even remotely imply, that elements *must* be provided in only this fashion and never in combined form.

[42]*In the Matter of the Petitions for Approval of Agreements and Arbitration of Unresolved Issue Arising Under Section 252 of the Telecommunications Act of 1996*, Case No. 8731 Phase II(c), (Md. P.S.C., November 2, 1998); *Investigation and Suspension of Tariff Sheets Filed by U.S. West Communications, Inc., with Advice Letter No. 2617, Regarding Tariffs for Interconnection, Local Termination, Unbundling and Resale of Services*, Docket No. 96S-331T (Colo. PUC, October 1, 1998); *Investigation into New England Telephone and Telegraph Company's (NET's) Tariff filing, Open Network Architecture, including the Unbundling of NET's Network, Expanded Interconnection, and Intelligent Networks in, re: Phase II, Module Two*, Docket No. 5713 (Vt. P.S.B., October 8, 1998).

G1. Terms and Conditions

In sub-issue (a) below, we address the question of whether the adequacy of the basic template offered by BA-ME, or whether other sources available for collocation charges, terms, and conditions, should apply to MMTP. In sub-issues (b) through (i) below, we address specific collocation issues identified by the parties.

a. Use of FCC or New Hampshire Terms & Conditions

In its Combined Brief, MMTP characterized the Bell Atlantic template as "wholly inadequate to address the issues and complexities of collocation," and stated it had requested a proposal from Bell Atlantic to improve on those terms. MMTP stated that BA-ME offered two options to MMTP: (1) BA-ME's FCC tariff for expanded interconnection, or (2) its Statement of Generally Available Terms (SGAT) that was permitted to take effect in New Hampshire pursuant to TelAct sections 252(f)(3) and (4), although it has not yet been approved by the New Hampshire Public Utilities Commission. MMTP argued that these other options are flawed, principally because they do not address Maine-specific circumstances. MMTP stated that BA-ME subsequently agreed to resolve some of MMTP's concerns, but that BA-ME's proposed "best and final offer" agreement "remains materially flawed." BA-ME stated in its Direct Presentation that it offered MMTP terms from its FCC collocation tariff and the New Hampshire SGAT, as well as its CLEC Handbook, but that MMTP "sought to re-write its own collocation" terms with greater specificity. BA-ME stated that it "accepted as much of the language" proposed by MMTP "as is consistent with applicable federal and state law and BA-ME's practices regarding collocation."

MMTP argues that it should not be restricted to the New Hampshire SGAT or FCC tariff terms. MMTP states that Bell Atlantic has adopted a position before the FCC that national collocation standards are not needed and that flexibility at state and carrier levels is desirable. MMTP complained that BA-ME adopted a contrary position during these negotiations, foreclosing flexibility.

MMTP points out that the *Local Competition Order* rejected claims from incumbent LECs that their tariffs filed with the FCC pursuant to the *Expanded Interconnection Order* should cover requests for collocation . . . ." The FCC distinguished the *Expanded Interconnection Order* tariffs as both broader (in their applicability, to retail customers and IXCs as well as to CLECs) and narrower (in rights extended, those under the TelAct being more extensive) than the rights available under 47 U.S.C. § 251()(6). The FCC ruled that carriers requesting interconnection "should have the choice of negotiating an interconnection agreement pursuant to sections 251 and 252 or taking tariffed interstate service under our Expanded Interconnection rules." *Local Competition Order* § 612.

BA-ME stated in its Direct Presentation that it had recently proposed to modify its federal collocation provisions to incorporate "a number of features which had been urged by various requesting collocators." BA-ME stated "a compelling need for BA-ME to administer and implement collocation on a uniform, nondiscriminatory manner."

As discussed at Issue B5 above, we are sensitive to Bell Atlantic's desire to simplify its administration of interconnection negotiations. Nevertheless, we are also mindful of the fact that Bell operating companies are not permitted to rely

solely on prepared statements of generally available terms and conditions for interconnection, and that "[t]he submission or approval of [an SGAT] shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251." 47 U.S.C. § 252(f)(5). Significantly, in sub-issues (b)-(i) below, BA-ME has not made any specific claims that the MMTP requests that deviate from various existing sets of terms and conditions will cause any substantial administrative burdens to BA-ME.

In its Direct Presentation, BA-ME stated that it had accepted MMTP proposed language if "consistent with applicable federal and state law *and BA-ME's practices* regarding collocation" (emphasis added). BA-ME's willingness to meet federal and state law for its collocation practices is required in any event; any BA-ME practices that are materially more restrictive than provisions of federal and state law should not control or restrict the freedom of entities requesting interconnection to negotiate pursuant to §§ 251 and 252.

b. Collocation Locations

i. "Premises"

MMTP complains in its Combined Brief that BA-ME is attempting to limit MMTP's ability to collocate to BA-ME's "Housing Party Wire Centers." It cites FCC statements in the *Local Competition Order* at ¶ 573, that "broadly" defined "premises" as including "any structures that house LEC network facilities on public rights-of-way, such as vaults containing loop concentrators or similar structures," along with "LEC central offices, serving wire centers and tandem offices . . .

." *See also* 47 C.F.R. § 51.5 (definition of "premises"). MMTP argues that BA-ME's attempts to restrict MMTP's collocation to wire centers violates the FCC rulings.

BA-ME argued in its Reply Brief that MMTP is seeking "to obtain further unbundling of the loop and access subloops in remote facility housings." BA-ME claims that its proposed restrictions are valid because "subloops are not network elements, [and thus] there is no right to access subloops through collocation." In Issue E3 above, we have decided that subloops may be an unbundled network element, and that whether access is technically feasible must be determined pursuant to a BFR process. We will be holding a hearing on the first issue in the near future.

MMTP may or may not ultimately have a need to collocate at locations other than central offices. Even if it is not feasible to access subloops, at FDI (feeder distribution interfaces) and other such locations, access at those locations may be useable for interconnection pursuant to TelAct section 251(c)(2) (exchange of traffic between carriers). We therefore see no reason for this Interconnection agreement to limit the locations at which MMTP may collocate.

We addressed a similar argument by BA-ME at Issue A1 above (Points of Interconnection), where BA argued against a provision allowing interconnection at all "technically feasible" points, even though the Act requires interconnection at all technically feasible points. The FCC's regulations require interconnection not only "at a minimum" at several specifically listed locations, but at all points at which access to unbundled network elements are permitted. We reject BA-ME's argument here for the same reasons we rejected it at Issue A1. At Issue A1, BA-ME presented an argument that MMTP would attempt to use the right to

interconnect at all "technically feasible" points to gain advantage in its attempts to obtain access to certain network elements. Neither that argument nor the similar argument it presents here has any merit.

ii. Availability of Collocation Space

MMTP has requested BA-ME to agree to a provision requiring it to provide proof of any unavailability of collocation space prior to bringing a dispute to the Commission. BA-ME has refused. The *Local Competition Order* requires that ILECs "demonstrate to the state commission's satisfaction that there are space limitations on the LEC premises or that technical considerations make collocation impractical." The FCC's regulation states that ILECs must furnish the "state commission with detailed floor plans or diagrams of any premises where the incumbent alleges that there are space constraints." 47 U.S.C. § 51.321(f). MMTP has proposed that BA-ME furnish either floor plans to it or provide it with a walk-through of the affected premises if BA-ME claimed unavailability, and that any continuing dispute on space availability would at least initially be subject to the dispute resolution procedure in the agreement.

In its Reply Brief, BA-ME dismissed MMTP's request for a walk-through provision as "a solution in search of a problem," and stated that such tours "would be disruptive" of its operations. BA-ME stated it "expects to have adequate space to meet reasonable foreseeable requests for physical collocation" and thus that a walk-through provision in the agreement was unnecessary.

If BA-ME indeed has adequate space to meet collocation needs, a walk-through provision will not be a burden on BA-ME because it will not be

exercised. If a MMTP collocation request were denied because of a claim of inadequate space, the FCC's Local Competition Order gives this Commission a role in determining whether "space limitations on the LEC premises . . . make collocation impractical." In such a case, the Commission would likely consider a walk-through inspection as part of its independent determination. A walk-through that would involve both ILEC and CLEC representatives could facilitate a resolution between the parties before a space dispute would need to be brought to the Commission, and thus is reasonable. Nothing in the FCC's regulations suggests that disputes over space availability must be brought to state commissions prior to an informal or formal dispute resolution process under an interconnection agreement. There is a clear parallel between MMTP's proposal and the provisions in Chapter 280, § 5, that allows carriers and customers to request access to services or facilities from any person first prior to bringing the dispute to the Commission.

c. Special Construction Charges

MMTP has complained that BA-ME's proposal seeks to impose charges for special construction that would be "unverified and potentially discriminatory." BA-ME special construction costs would be charged to MMTP in addition to standard collocation costs for construction of common room space. MMTP did not object to paying those charges, if they are fair, but complains that BA-ME refuses to allow MMTP to verify the reasonableness of such charges, "through on-site inspections prior to determining whether to proceed with construction." MMTP argues that a lack of verification would provide an anticompetitive incentive for BA-ME to inflate costs. In addition, according to MMTP, BA-ME has insisted on flowing through

actual charges for certain collocation-related construction. It is not clear from MMTP's brief whether the charges in question are only those that are from third parties, or would include those resulting from work performed by Bell Atlantic itself as well. In any event, MMTP prefers to know the costs in advance. MMTP characterizes BA-ME's position as requiring it to provide a "blank check." Apparently BA-ME will provide cost estimates in advance of the work, but will not agree, as MMTP has proposed, to limit its charges to within a certain percentage above its estimate.

BA-ME characterized these charges in its Reply Brief as reflecting "a flow-through of actual charges by third parties to BA-ME, . . . similar to the manner through which BA-ME recovers its out-of-pocket costs from non-CLEC customers." BA-ME also does not make wholly clear whether charges from third parties are the only kind of costs it seeks to pass through. BA-ME claims that the charges (at least those from third parties) "are not open-ended subject to BA-ME's control." The costs are, of course, to a great extent subject to the control of BA-ME's, at least if BA-ME does any of the construction itself or selects contractors who perform the work.

We note first that numerous utilities, including CMP, BHE and all water utilities pursuant to Chapter 65, § 3(A), charge for line extensions and water main extensions pursuant to an estimate rather than ultimate actual costs. Those utilities' experience shows that customers prefer to know the costs in advance. We see no reason why BA-ME cannot afford its relatively small number of CLEC customers a choice between using estimates for the charge rather than actual cost. Bell Atlantic is presumably as capable as those other utilities are of providing accurate estimates.

MMTP is of course correct that BA-ME has no particular incentive to keep the construction costs for collocation facilities low; indeed, the incentives are the opposite, at least for collocators that are competitors.

"Estimate" is defined in Webster's New Collegiate Dictionary both as "a rough or approximate calculation" and as "a statement of the amount for which certain work will be done by one who undertakes to do it." The latter nearly describes practices of the construction industry.

Bell Atlantic shall allow MMTP the opportunity to inspect potential collocation sites at reasonable times. BA-ME shall not charge more than the estimate it provides to MMTP, including estimates provided by third parties. While charging the estimate satisfies MMTP's concern that it knows in advance what charges it must pay, it does not address any concern about the reasonableness of the costs. Indeed, if BA-ME may only charge the amount of its estimate, it has every incentive to increase the estimate to make sure that it covers its ultimate actual cost.

We decide that if either party has reason to believe the costs will equal or exceed $15,000, or if BA-ME's initial estimate is for $15,000 or more, the interconnection agreement shall "permit" MMTP to request BA-ME to conduct a bidding process, at MMTP's expense. If the parties cannot agree on the amount of the cost for the bidding process, MMTP may conduct its own bidding process. Because any contractors will be working on BA-ME's property, BA-ME may select the winning bidder. If BA-ME has good cause not to select the lowest bidder, it may do so and shall provide MMTP with its reasons. If MMTP believes that the lowest bid should be selected, the parties shall proceed to a dispute resolution process.

d. Collocation Cage Size

MMTP states that it has sought three modifications to the BA-ME template. It requests modifications to allow for: (1) the collocation in common areas, (2) smaller physical spaces than the typical 100 or 300 square foot cages, and (3) the ability to share leased space with other carriers.

BA-ME stated in its Reply Brief that it had recently amended its FCC collocation tariff to "make cages available in sizes as small as 25 square feet; allow collocator's (sic) to sub-lease (sic) space; and offer the alternative of secured common space for all collocators (SCOPE)."

MMTP argues that there are significant differences between Bell Atlantic's FCC tariff and its initially-proposed BA-ME SGAT. According to BA-ME witness Lear, a 100 square foot space leased under the FCC tariff would cost "close to $54,000," but that the same cage would cost "approximately $25,000" if acquired through BA-ME's earlier SGAT proposal. (Tr. B-190)

Although some of BA-ME's recent changes appear to satisfy the three MMTP requests discussed above, MMTP states that BA-ME has refused to allow MMTP to share collocation space "unless Mid-Maine uses Bell Atlantic's FCC tariff (which imposes costs far in excess of the preliminary SGAT rates)." MMTP objected to this restriction as "a blatant effort by BA to force collocators to incur the highest possible costs to compete with BA." MMTP stated that the parties "discussed several potential methodologies under which sub-letting could be accomplished," but stated that the parties could not reach agreement on this issue. MMTP suggested no specific alternatives to the use of the FCC tariff, however. BA-ME witness Lear states

(apparently as a general matter) that MMTP may accept the filed (but withdrawn) proposed SGAT rates for Maine. He claims that they are cost-based, but does not discuss BA-ME's proposed requirement that a collocator who wishes to sublet its space must buy from the FCC tariff. BA-ME also has not provided any reason why the FCC tariff contains much higher charges for equivalent space than the other price sources described above, and has provided no cost justification for any of the various rate sources.

Competitors that may have significantly different interests, markets, and technologies should not be forced into a single uniform mold to obtain collocation. BA-ME has not provided any reasonable basis for its requirement that collocation space may be shared only if it is acquired pursuant to the (more expensive) FCC tariff.

Other alternatives include the original Maine SGAT (suggested as an alternate by BA-ME in its Reply Brief in discussing Maine-specific costs), the New Hampshire SGAT, the CLEC Handbook, or direct negotiation. We rule that MMTP may purchase collocation space from any of the sources listed above.

e. Contradictory Language

In its Final Brief, MMTP characterized language in the Bell Atlantic template for collocation as "potentially contradictory with language already included elsewhere in the Agreement." MMTP stated that potential conflicts exist in five areas: liability/indemnification, confidentiality, insurance, billing/payment, and termination for cause. MMTP argued that the language contained in the main body of the agreement should govern these matters rather than the specific terms and conditions in the collocation template. MMTP states that parties had "successfully negotiated" general

provisions related to the group of issues described above, but that "BA continues to impose language" that is different from the negotiated language.

BA-ME argued in its Reply Brief that the template collocation language was more specific than language in the main body of the agreement and was intended to provide "complementary" provisions that would "take precedence over the more general contract terms." It also argued that the template language did not conflict with any general language. BA-ME claims that its risks from collocation are "significantly greater" than they are from interconnection "generally," justifying the more specific language. BA-ME stated that MMTP "may avoid these provisions by electing not to collocate." BA-ME's position fails to take account of the fact that the TelAct requires ILECs to provide collocation at rates, terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(6).

BA-ME provides no support for its conclusory argument that the risks associated with collocation are greater than they are from interconnection or access to UNEs. Inasmuch as interconnection and access to UNEs often takes place at collocation sites, BA-ME's argument does not appear to make sense.

Both in its main and Combined Briefs, MMTP listed several instances of alleged overlap or conflicts. BA has not responded to MMTP's arguments that additional provisions are not necessary or that they conflict with the negotiated "general" provisions. Bell Atlantic also has not adequately addressed MMTP's argument that BA should not attempt to impose additional terms and conditions after the parties negotiated "general" terms and conditions. We will not permit additional terms or conditions to supersede negotiated ones.

MMTP did not provide specific objections to any of BA's proposed terms and conditions that addressed matters outside the scope of the five subject areas that the parties negotiated, as described above and in MMTP's Combined Brief. Terms and conditions that address matters outside the scope of those five areas will be permitted, provided they are contained in BA-ME's collocation template and provided they have been presented to MMTP prior to the filing of both parties' final briefs. However, we will require the agreement to include a separate term and condition that shall state that in the event of a conflict between a negotiated generally applicable term and condition and one of the collocation template terms and conditions, the negotiated generally applicable T&C will control.

f. Maine-specific Pricing

MMTP stated in its Combined Brief that although the Commission established interim rates in the AT&T-NYNEX arbitration in Docket No. 96-510, those rates did not establish collocation rates. MMTP states that BA-ME has proposed pricing based on New Hampshire cost studies, and that "BA has not even attempted to substantiate these charges as appropriate for Maine." MMTP proposed that the New Hampshire SGAT rates in effect at the time of our AT&T arbitration decision be applied as interim rates until the Commission adopts Maine-specific rates. MMTP argued that the pricing should be adjusted where it uses "minimal amounts of space" or where MMTP's use does not require heating or power.

In its Reply Brief on this issue, BA-ME referred to Witness Lear's explanation that MMTP may subscribe to either FCC tariff rates or SGAT rates that reflect New England-wide collocation costs. Those rates were filled in both New

Hampshire and Maine, but subsequently withdrawn in Maine. BA-ME stated there are no Maine-specific costs or rates "as there is an insufficient number of collocation arrangements in Maine from which to derive a cost study." Similarly, there are no New Hampshire-specific rates, as the NH SGAT is also based on New England-wide costs for interconnection and UNEs.

In the AT&T-NYNEX arbitration, we made numerous findings and rulings based on the New Hampshire arbitrator's recommendations, and we adopted "on an interim basis," rates "based on New Hampshire-specific cost inputs." We ruled in that case that those rates "shall be in effect for at least six months and for an indefinite term thereafter," and stated that "the interim rates should be replaced by Maine-specific rates" thereafter.[43] We have not subsequently adopted any Maine-specific rates. In Docket No. 96-510, we adopted "charges . . . based on the expanded interconnection tariff rates filed with the FCC to be replaced by NYNEX's approved TELRIC rates [for New Hampshire] . . . available in April, 1997." Because the quoted passage addresses collocation rates, we read the term "interconnection" to include "collocation" rates, even though the term "interconnection" in the TelAct does not include "collocation." *See* 47 U.S.C. § 251(c)(2) and (c)(6).

As noted above, MMTP states that the BA-AT&T arbitration in Docket No. 96-510 did not adopt collocation rates. We are not certain that such rates were ever actually filed in New Hampshire. If they exist, MMTP may choose to use

[43]See *AT&T OF NEW ENGLAND, INC. / NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY D/B/A NYNEX: Requests for Arbitration Pursuant to Section 252(B) of the Telecommunications Act of 1996*, Commission Decisions on Arbitrated Issues (Dec. 4, 1996) at 104-107.

those collocation rates. If not, MMTP may use the rates filed in the Maine or New Hampshire SGAT, based on current New England-wide costs, or the FCC rates. At this time there are no rates based on Maine-specific costs; the parties have not litigated those costs in this case. As discussed at Issue O1, both parties agree that when we establish Maine-specific rates, they shall apply to MMTP.[44]

g. Notice of Changes in Conditions

MMTP complained in its Final Brief that Bell Atlantic refuses to "provide reasonable notice of any instances where BA-initiated 'significant work activities' that could affect Mid-Maine's collocated equipment" and of "any emergency or activity that BA reasonably could conclude would adversely impact Mid-Maine's equipment." In its Reply Brief, BA-ME dismissed MMTP's objection as to this issue (as well as those discussed below in (h) and (i) below as "frivolous." BA-ME provided a single statement for all three of these sub-issues. It stated "[a]ffording Mid-Maine collocation pursuant to either the terms and condition (sic) of BA-ME's FCC tariffs or New Hampshire SGAT is sufficient and Mid-Maine's remaining 'what-if' objections should be rejected."

BA-ME's conclusory statement provides us with no basis upon which to address Bell Atlantic's underlying reasons, if any, for its statement. As to this sub-issues and the two below (h and i) we find that Bell Atlantic has waived its right to present a reasoned and explained argument.

If Bell Atlantic becomes aware of activities that would adversely impact its own equipment, it is reasonable to assume that it would notify responsible

[44]They disagree, however, about whether they should apply retroactively.

Bell Atlantic personnel. Denial of the same notice to collocators who are potential competitors would be discriminatory and anti-competitive. The agreement shall require BA-ME to provide such notice of the requested events that is reasonable under the circumstances that exist at the time. (When there is a fire, BA should call the fire department first.)

h. Training Charges

In its reply brief on this issue, MMTP complained that Bell Atlantic sought to have MMTP train BA-ME employees on virtual collocation equipment installed by MMTP whenever such equipment was not in use by BA-ME on the same premises.[45] MMTP argued that Bell Atlantic work force units serve a number of central offices, and that MMTP should not have to train BA-ME employees if Bell Atlantic's work force already serves other BA-ME central offices where such equipment is installed. MMTP stated that BA-ME did not provide information that would clarify which central offices are served by its various work force units.

In a related sub-issue, MMTP objected to a BA-ME proposal that MMTP be responsible for the costs of training "either 50% of the work force that might reasonably be expected to work on the equipment but no fewer than five people." MMTP stated that BA-ME had not provided information on work unit sizes, and proposed that MMTP "be required to train the lesser of 50% [of the work unit size at the time of the training request] or five people."

[45]Under "virtual collocation" a requesting telecommunications carrier any specify and use equipment for the purpose of interconnection or obtaining access to unbundled network elements. *See* 47 C.F.R. § 47.5 (definition of "Virtual Collocation").

Finally, MMTP objected to Bell Atlantic's refusal to incorporate into the agreement "language that would protect Mid-Maine from paying for any retraining or additional training that may result when technicians previously trained at Mid-Maine's expense either leave a work unit or prove to be inadequately knowledgeable about Mid-Maine's equipment despite training." MMTP claims that Bell Atlantic during negotiations acknowledged the responsibility for work force management after training.

As discussed above, at issue G1(g), BA-ME dismissed MMTP's objection as "frivolous," and presented only a one-sentence conclusory statement that "[a]ffording Mid-Maine collocation pursuant to either the terms and condition (sic) of BA-ME's FCC tariffs or New Hampshire SGAT is sufficient and Mid-Maine's remaining 'what-if' objections should be rejected." BA-ME has waived its right to present a reasoned and explained argument on this sub-issue.

MMTP should be required to pay to train only those BA-ME employees that may reasonably be expected to be responsible for MMTP equipment within the scope of their duties. MMTP shall be responsible for the costs of training the lesser of five BA-ME employees or 50% of the size of a work unit at the time of the training request. We will not permit BA-ME to require needless retraining. Thus, if a BA-ME work unit that is responsible for the location in question is already trained to work on the type of equipment installed by MMTP (for whatever reason, even if the training took place because of another carrier's equipment), MMTP shall not be responsible for any training costs. BA-ME has control over its own work force assignments. It shall bear the responsibility for retraining or additional training that are

required as a result of personnel reassignments or inadequate performance after training.

i. Reasonable Expectation of Occupancy

MMTP has agreed that Bell Atlantic has the right to "reclaim" collocation space for a variety of reasons.[46] MMTP complains, however, that Bell Atlantic will not agree to give MMTP "a reasonable expectation of occupancy" in collocation spaces. MMTP also argues that Bell Atlantic should reimburse MMTP on a pro-rated basis if BA-ME reclaims space. A post-brief telephone conference on January 18, 1999 clarified that MMTP has made its requests in the alternative. According to MMTP, a "reasonable expectation of occupancy" is a form of guarantee that the space will be available for the contracted-for term. BA-ME has agreed to refund a pro-rated amount of its rent if MMTP voluntarily vacates collocation space, and if another collocator thereafter occupies it.

In its briefs, BA-ME responded to this sub-issue only with the single blanket statement, applicable to sub-issues g, h and i, that MMTP's objections are "frivolous" and that "[a]ffording Mid-Maine collocation pursuant to either the terms and condition (sic) of BA-ME's FCC tariffs or New Hampshire SGAT is sufficient and Mid-Maine's remaining 'what-if' objections should be rejected."

Subsequent to briefing, in the January 18 telephone conference, BA-ME stated that it opposed both alternatives described above. As noted above, BA-ME has agreed to pay MMTP a pro-rata amount if MMTP voluntarily vacates and

[46]We assume that the word "reclaim" means simply "take back" or, from the point of view of the tenant, "evict." If "reclaim" is a term of art meaning more than the common meaning described above, no party has explained it.

the space is filled. In a telephone conference BA distinguished that agreement on the ground that in that situation a replacement collocator would be occupying the space. By contrast, under at least one of the "reclaiming" circumstances mentioned by BA-ME, shutting down a central office, no replacement collocator is possible. Bell Atlantic emphasizes that such a circumstance would be rare, however, because of the expense of reconfiguring wire centers. It is also possible that there may be circumstances under which BA-ME might reclaim the space from a particular collocator, but that such space would be available to another collocator.

We see another distinction between the two circumstances, and it does not favor BA's position. In the first situation, MMTP itself has made the decision to leave; in the second circumstance BA-ME has made a unilateral decision to take space back from a collocator. We find that it is reasonable that BA-ME should have a limited responsibility to reimburse MMTP for its equipment if BA has made a conscious decision to evict MMTP, provided that MMTP's own actions are not the grounds for the eviction. BA-ME shall reimburse MMTP for a pro-rated share of MMTP's construction costs if it reclaims space from MMTP whether or not another collocator occupies the space. BA-ME's obligation shall be limited to the pro-rated share of MMTP's construction costs, less reasonable salvage costs. If another collocator does not take over the space, MMTP must take reasonable efforts to salvage any materials than can be removed.[47] We distinguish "construction costs," e.g., the costs of building a collocation cage, equipment racks, and providing electrical wiring from "equipment" that MMTP may remove.

[47]We do not consider the pro-rating of rent, as we assume MMTP would pay in advance only on a relatively short-term basis.

j. Virtual Collocation of Jumper Wires

We do not need to consider this sub-issue because of our resolution of Issue E7 above.

H1. Directory Listing Indemnification

BA wants MMTP to indemnify it against any claims that are brought against BA related to a listing or mis-listing of a MMTP customer. BA's broad language encompasses situations where MMTP or its customer provides correct information to BA, but BA's listing is incorrect. Under BA's proposed language BA wants MMTP to indemnify it even if the listing is wrong due to BA's negligence.

We find the MMTP should only be required to indemnify BA for its own negligence. BA should be responsible for its own negligence and therefore it would be unreasonable to require MMTP to indemnify that. The indemnification sought by BA, contrary to Maine common law policy, which does not favor indemnification of a party for its own negligence. *Emery Waterhouse Co. v. Lea,* 467 A.2d 986 (Me. 1983).

H2. Operator Service Indemnification

BA wants MMTP to indemnify it against any claims brought by a party because of a call interrupt made on behalf of a MMTP customer. BA has failed to provide any convincing reasons why MMTP would likely be liable for a call interruption made by a BA operator where MMTP's only role is contracting with BA for BA to provide that service to it. BA has failed to establish how it is likely that MMTP (and, derivatively, BA) would incur a substantial risk of liability if a MMTP customer requested the interruption and paid MMTP for that interruption would create. We therefore cannot find a sufficient reason to require MMTP to indemnify BA.

The agreement may, of course, require MMTP to seek to limit its liability for call interruptions where a MMTP customer requests the interruption and a BA operator interrupts, by placing language to that effect in MMTP's retail tariff.

L1. To What Extent Agreement May Incorporate Tariffs?; and

L2. Extent to Which all Rates and Charges Must be Identified in Attachment A

In addition to its interconnection agreements with individual CLECs, BA-ME presently has in effect, and from time-to-time will introduce new tariff provisions that address matters related to interconnection, UNEs and access to those UNEs. BA-ME proposes that the interconnection agreement include the following provision that would govern the applicability of the tariff provisions described above:

> 11.10.1 ULLs [unbundled local loops] and other Network Elements will be offered on the terms and conditions, including rates and charges, specified herein and on such other terms as stated in applicable Tariffs, as amended from time to time, that are not inconsistent with the terms and conditions set forth herein.

MMTP opposes the inclusion of this provision in the interconnection agreement. It argues generally that only the terms, conditions, rates and charges that are contained in the interconnection agreement should apply to those services addressed by the interconnection agreement.

It appears, therefore, that the dispute is over only those rates, terms and conditions that do not relate to a service that is included in the agreement, but which do not conflict with the agreement's prices or terms. The provision is likely to apply only to such matters as ancillary services.

The dispute is narrowed further by other tariff applicability that MMTP does not contest.

The dispute in fact is fairly narrow. First, as is clear from the face of BA-ME's proposed agreement provision, no tariff rate, term or condition that actually conflicts with ("is consistent with") a rate or term contained in the interconnection agreement will apply. MMTP agrees with this much of BA-ME's proposal. Second, MMTP has stated that it agrees that tariff provisions should apply to any service, network element or form of interconnection that is not addressed the agreement.

Third, MMTP states that BA tariff provisions could actually supersede rates or terms in the interconnection agreement even if they conflict, if BA filed them as the result of a Commission order, policy or rule that was applicable to all carriers. Under that circumstance, the parties would amend the interconnection agreement to comply with the new legal requirement.

Similarly, MMTP agrees that tariff rates or terms could apply, even if conflicting, if the Commission "affirmatively" ordered the changes in a litigated proceeding, for example, the Commission's proceeding that is addressing cost and price issues for interconnection and UNEs under the TelAct (Docket No. 97-505), or a tariff filing by BA-ME that is suspended and actively investigated.[48]

MMTP agrees that a non-conflicting tariff rate or term applicable to a service governed by the agreement could apply if it agreed to let it apply.

[48]The Commission might also "affirmatively" approve rates contained in a statement of generally available terms (SGAT) filed by BA-ME under 47 U.S.C. § 252(f). We would not expect those rates to supersede rates contained in an interconnection agreement, as an SGAT is clearly intended under the TelAct as alternative to a negotiated or arbitrated interconnection agreement.

MMTP does not agree, however, that a BA-ME tariff should apply to a service covered by the interconnection agreement if it was approved by operation of law (not suspended); or if it was suspended, but no active investigation took place and the suspension was ultimately lifted.[49]

As to the narrow, even ancillary, matters that are subject to dispute, the practical effect of two parties' positions is this: under Bell Atlantic's proposed provision, MMTP would be required to use the rate contained in the tariff; under MMTP's position, MMTP would be free to accept the tariff rate, but it would also be free to request Bell Atlantic to provide a different rate, either under a special contract authorized by state law (35-A M.R.S.A. § 703(3-A)), or pursuant to a negotiated agreement under the TelAct.

In support of its position with regard to tariff terms and conditions (Issue L1) MMTP argues:

> Allowing Bell Atlantic to modify the Agreement by tariff wastes resources and undermines the stability of the Agreement. First, allowing a tariff to govern would require Mid-Maine to constantly monitor Bell Atlantic's tariff *filings and compare the terms in those filings in detail* to the terms of its agreement with Bell Atlantic.
>
> . . . .
>
> Most importantly, allowing a tariff to govern allows Bell Atlantic to reinstate contract provisions intentionally deleted or that the Parties purposefully remained silent on . . .
>
> . . . .

[49] **EXAMINER'S NOTE**: The positions of the parties are not entirely clear from their brief. Much of the characterization above of the issues in this Issue comes from telephone conferences with the parties on January 11 and 18. If parties disagree with the characterizations, they should state their disagreements in their Exceptions.

> Bell Atlantic could simply insert these provisions in a tariff, and because the contract is *silent* on these issues, the contract would incorporate them under Bell Atlantic's proposal.
>
> . . . .
>
> Congress enacted Section 251 and 252 for the purpose of creating a competitive environment. In the competitive world, contracts are based on the four corners of the contract. Parties negotiate agreements and enter into them with the intent of upholding their terms and conditions.
>
> . . . .
>
> Neither Mid-Maine (nor Bell Atlantic) should be expected to monitor each tariff filing and oppose those filings if they are contrary to the spirit of the Agreement (even if they are not contrary to the exact letter).

With respect to tariff rates, MMTP makes similar arguments:

> There is a simple reason for the requirement of detailed rates and charges. To have competition, particularly where the wholesale provider is both the monopoly provider and the biggest potential competitor to the new entrant, there needs to be an element of certainty. A CLEC cannot formulate a business plan, much less make a tariffed offering to the public, if it cannot determine its underlying costs or if those costs are subject to change at the whim of its competitor. Nor should there be an incentive to create new and unjustified charges for alleged services.

Mid-Maine points out that TelAct section 252(a)(1) requires a negotiated interconnection agreement to "include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement."

While not expressly stated in the TelAct, we believe the same standard applies to

arbitrated agreements, given that state commissions in arbitrations must determine "rates for interconnection, services or network elements . . . . " 47 U.S.C. § 252(c)(2).

Bell Atlantic argues:

> In several contract areas, Bell Atlantic has found that the operation, implementation and administration of the interconnection arrangement is best facilitated by reference to external Bell Atlantic tariffs for salient terms and conditions. For example, the evolving, dynamic nature of costs, rates and charges is best captured by reference to BA-ME's tariffs, which would reflect all Commission-approved, just and reasonable changes to prices.

Bell Atlantic points out that its "tariff changes are pursuant to prior public notice, affording Mid-Maine and all other affected and interested parties ample opportunity to question or oppose the proposed schedule revision." BA-ME does not specifically address MMTP's concern that it would need to monitor and review numerous tariff filings. BA-ME also does not address MMTP's preference for stable rates.

Rate stability, and stability of terms and conditions, have value to most customers, especially those willing to enter a long-term contract. The term of this interconnection agreement (3 years) is not so long that terms, conditions or rates will become stale. Moreover, MMTP is willing to incorporate rates that the Commission "affirmatively" orders.

We find that MMTP's arguments concerning terms and conditions are reasonable. The need even to determine whether a proposed term or condition is not conflicting, and therefore whether it even might apply is particularly burdensome. We do not find MMTP's arguments concerning rates to be as persuasive, although we

ultimately agree with MMTP. By definition, MMTP's concern about rate stability can only apply to those rates that are actually contained in the interconnection agreement. Those rates are protected even under BA's proposal because they control over "conflicting" rates in the tariff. MMTP cannot claim reliance on the "stability" of any tariffed rates that do not conflict with rates in the interconnection agreement.

Notwithstanding our doubts about some of MMTP's arguments concerning the applicability of tariff rates, tariff rates otherwise applicable to services covered by the interconnection agreement shall not apply, even if they do not conflict with the rates in the agreement, unless they fall within one of the exceptions described above that MMTP has agreed to.

In ruling in favor of MMTP on this issue, we rely on four considerations. First, as explained above, the issue only exists as to additional, supplementary or ancillary rates for services governed by the interconnection agreement. Occasions where MMTP may actually request a rate different from that contained in the tariff are relatively rare. Any administration burden is minimized. Second, the ruling is consistent with our ruling above concerning the applicability of tariff terms and conditions. Inconsistent rulings could create havoc where an inapplicable term governed an applicable rate. Third, as a general matter, customers are not always bound by tariff; any customer may seek a negotiated special contract pursuant to 35-A M.R.S.A. § 703(3-A). That kind of customer choice is more consistent with competitive markets generally. We see no reason why the same choice should not be afforded wholesale customers.

Finally, related to the third reason, and most important of the four, our decision is more consistent with the general goals of the TelAct and is arguably required by it. Section 252(a)(1) requires incumbent local exchange carriers to negotiate an interconnection agreement "upon receiving a request for interconnection, services, or network elements . . ."[50] No express or applied limitations are placed on the timing of a request or the number of times that a requesting carrier may request a negotiation. Nothing in the TelAct indicates that an existing binding agreement precludes negotiation as to issues not addressed in the agreement, including prices for supplemental ancillary matters related to services that are addressed in the agreement. Thus, while a party could agree to waive TelAct right to further negotiation during the term of a binding agreement, it is doubtful that a state commission could require a party to do it.

Our conclusion that this result may be required by the TelAct is reinforced by the provision in TelAct section 252(f) Statement of Generally Available Terms (SGAT). In many respects, an SGAT resembles a tariff.[51] The TelAct makes it abundantly clear, however, that the SGAT should always be viewed as an alternative to a negotiated agreement. Section 252(f)(5) states:

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[50]Section 251(a)(1) states that the ILEC "*may* negotiate and enter in to a binding agreement with the requesting telecommunications carrier . . ." (emphasis added) "Negotiation" is required, however, if either carrier requests arbitration pursuant to section 251(b). *See* section 251(b)(5) (Initial Refusal to Negotiate.)

[51]Section 252(f) refers to "terms and conditions." That those terms and conditions include prices is clear. The SGAT must "comply with the requirements of section 251 and the regulations thereunder *and the standards applicable under this section*." (emphasis added) That language necessarily refers to the pricing standards of section 252(d).

> The submission or approval of a statement [SGAT] under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251.

The imposition of a state tariff would have much the same effect on a carrier's right to negotiate as the imposition of an SGAT.

For the foregoing reasons, we will not require MMTP to accept a provision in the interconnection agreement that applies tariff prices, terms and conditions to any services contained in the agreement.

M. RELATIONSHIP BETWEEN SECTION 252 AND 271

M1. Impact of Agreement on ILEC's 271 Application

Bell Atlantic has requested a provision in the agreement stating that the parties intend that the agreement comply with the "checklist" requirements of the Telecommunications Act. The proposed provision states:

> WHEREAS, Sections 251, 252 and 271 of the Telecommunications Act of 1996 have specific requirements for interconnection, unbundling, and service resale, commonly referred to as the "Checklist," and the Parties intend that this Agreement meet those Checklist requirements.

MMTP objects to the proposed provision. It argues that the *Local Competition Order* prohibits a provision of this type. Paragraph 152 of the *Local Competition Order* addresses the general issue of whether requests by one party to another to limit its legal remedies constitutes a violation of the requirement in section 252(b)(5) to negotiate in good faith. The FCC declined to adopt a *per se* prohibition, but it did rule:

> . . . an incumbent LEC may not demand that the requesting carrier attest that the agreement complies with all the provisions of the 1996 Act, federal regulations or state law, because such a demand would be at odds with the provisions of sections 251 and 252 that are intended to foster opportunities for competition on a level playing field.

Local Competition Order ¶ 152.

Bell Atlantic argues that the proposed provision does not violate the FCC's ruling because it would only state that the parties "intend" that the interconnection agreement meet the objectives of section 271. 47 U.S.C. § 271 describes the state and FCC proceedings that must take place and the findings the FCC must make prior to allowing Bell Atlantic (or, in this case, BA-ME) to provide interLATA service.

We do not need to decide whether the distinction argued by BA is valid. We will not order in any event the provision to be included in the interconnection agreement.

We can only assume that Bell Atlantic believes that the reference in the provision to section 271 will bolster its cases under section 271; we cannot think of another reason for it. The inclusion of this provision will not influence any decision or recommendation we must make in our proceeding under section 271. We also doubt that such provisions will have any influence on the FCC in its section 271 proceedings. Whether Bell Atlantic is able to provide interLATA service will depend on its actual record of meeting the section 271 checklist.

The provision also refers to sections 251 and 252. Prior to approving the final agreement, we must find that all provisions, negotiated and arbitrated, are

consistent with section 251 and the pricing provisions of section 252(d). *See* 47 U.S.C. § 252(e)(2)(B). The inclusion of the proposed provision adds nothing to that determination.

O. APPLICABLE RATES AND CHARGES / PRICING

1. Applicable Rates and Charges / Prices

Both parties have agreed that they will use the interim rates approved in the AT&T-Bell Atlantic arbitration decided in Docket No. 96-510, for the indefinite future, i.e., until the Commission establishes permanent rates for Maine in the proceeding that is addressing costing methodologies and prices for UNEs, Docket No. 97-505. Both parties also agree that the agreement will state that permanent rates established by the Commission will apply after the effective date of those rates.

Bell Atlantic, however, wants to apply those final rates established retroactively to the interim period, using a true-up mechanism.

The mechanism proposed by Bell Atlantic raises at least question about whether such a retroactive true-up mechanism may constitute unlawful retroactive ratemaking. The fact that any such rates will apply under a contract (or, more particularly, an interconnection agreement required by federal law) and will apply to a wholesale customer rather than a retail customer do not necessarily remove those concerns. The rate is a rate for intrastate telephone service. We do not have to decide that question, however, because we can think of no strong policy reason for requiring such a mechanism, and sound policy reasons not to do so.

MMTP states that it desires certainty as to its future rates; after planning for and paying rates it knows in advance, it does not wish to be faced with an

after-the-fact adjustment to the amount that is paid, even if the permanent rates are lower. Bell Atlantic has not presented any argument that counters MMTP's desire for certainty or that there is any positive policy benefit to a true-up. Indeed, certainty as to future rates may be one of the underpinnings of the doctrine against retroactive ratemaking, although clearly there are other bases as well. *See New England Tel. & Tel. Co. v. Public Utilities Commission*, 362 A.2d 741 (Me. 1976) ("NET II"); *Public Advocate v. Public Utilities Commission*, 1998 Me. 218, 718. Bell Atlantic suggests that MMTP could have "certainty" if it simply accepted the rates BA has filed in the cost study proceeding "which BA believes accurately reflect costs." BA makes this argument notwithstanding the fact that it still proposes a true-up of the difference between its proposed rates and the final rates. To make such an argument, BA necessarily must assume that the rates it has proposed are closer to the final rates we will find than are the interim rates we adopted in the AT&T-NYNEX arbitration. We cannot share BA's confidence. We have found that the interim AT&T rates are consistent with sections 251 and 252 of the TelAct. We have made no findings whatsoever about the rates BA-ME has filed in the cost study proceeding.

In the AT&T-Bell Atlantic arbitration, we ruled that there should be no true-up provision, at least for a period of approximately 6 months. We have not been presented with any reason to reject the precedent from that case.[52]

P1. Bona Fide Request Process ("BFR")

[52]In its briefs, BA states that MMTP agreed to a true-up for local loop rates, consistent with a similar provision in a prior interconnection agreement. MMTP did not state that it has made such an agreement in its briefs, but stated in a telephone conference that it had agreed to such a provision in the course of negotiations. Because this issue has been fully litigated, and because of the policy reasons stated above, we see no reason to require a true-up for any UNE price.

The parties have agreed to use BA-ME's Bona Fide Request Process if MMTP requests a network element or service that is not provided under the agreement. Although both BA and MMTP have agreed on most aspects of that process, the remaining issue in dispute concerns how the BFR process will handle requests for elements or services that BA has already provided either to Mid-Maine or to other requesting carriers pursuant to a prior BFR request.

The BFR process is designed to address the provisioning of network elements and services that Bell Atlantic does not currently provide. It is a relatively lengthy and involved process. MMTP must first make a request in writing; BA then will respond with a preliminary analysis and a cost quote. If MMTP wishes to proceed with the request, BA has another 90 days to respond with a detailed report. The parties must then negotiate terms and conditions to implement the request. This full process is unnecessary where BA already is providing the identical service or facilities to another entity. Where the service or facility is substantially similar but not identical to a prior BFR request, the process should not be eliminated entirely, but should be modified. In those instances BA will not need to engineer the facility from the bottom up, but will only need to adapt it to the slightly changed circumstances. BA's comparison of the BFR process to the provision of services on a "special assembly" basis is appropriate. We would not expect BA to totally re-engineer each special assembly if a subsequent request for a special assembly is substantially similar to a special assembly already being provided to some customers.

BA should provide MMTP with agreement, language that under the BFR process, eliminates unnecessary steps. The language should allow MMTP to request,

and require BA to provide, UNEs or interconnection arrangements under a BFR process that is shortened when the service or facility is similar but not identical to those already being provided by BA.

Dated: January 29, 1999

Respectfully Submitted,

_____

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with consultation from
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